Supreme Court, U. S.
FILED
MAR 17 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

No. 128 OCTOBER TERM, 1918.

OHIO VALLEY WATER COMPANY,
Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
Defendants in Error.

Motion of Plaintiff in Error to Advance.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
Attorneys for Plaintiff in Error.

1561 Frick Building Annex,
Pittsburgh, Pa.

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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Defendants in Error.

Motion of Plaintiff in Error to Advance.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiff in error in the above styled and numbered case moves and prays that said case be advanced for argument for the following reasons:

This case comes before your Honorable Court upon a writ of error to the judgment of the Supreme Court of Pennsylvania, allowed by Mr. Justice Pitney on May 27, 1918. Plaintiff in error respectfully avers that the judgment of the Supreme Court of Pennsylvania, and the order of The Public Service Commission of

Pennsylvania, thereby reinstated, amount to a deprivation of the property of the plaintiff in error without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The plaintiff in error (herein sometimes called the "Water Company") is, and for many years has been, furnishing an ample supply of pure water to the public in a large and populous territory in Allegheny County, Pennsylvania, lying on both sides of the Ohio River immediately west of, and contiguous to, the City of Pittsburgh. Upon complaints of the defendants in error filed with the Public Service Commission of Pennsylvania, the entire property of the Water Company was valued by the Commission as of January 1, 1916. On that date the Water Company had outstanding $1,000,000 of bonds, $110,000 of floating debt, and $1,000,000 of capital stock. The majority of the members of the Commission found that the total value of the property of the Water Company, as of said date, was $924,744, *which is* $185,000 *less than the said indebtedness of the company.* By reason of this valuation the majority of the Commission, on or about February 12, 1917, ordered a sweeping reduction in the Water Company's rates.

Commissioner Rilling was the only member of the Commission who heard the testimony and he was the only member who examined the property of the Water Company. He was one of only three members of the Commission who heard any oral argument of the case prior to the decision. Commissioner Rilling filed a vigorous dissenting report in which he held that both the valuation and the return allowed were inadequate.

Under the Pennsylvania Statute, which gives broad powers to the Superior Court of Pennsylvania on appeals from the Commission, the Water Company appealed to the Superior Court and the *Superior Court, after a careful examination of the evidence, unanimously reversed the Commission* on the ground that the valuation made by the Commission was inadequate and its order confiscatory. The Superior Court held that the Commission's valuation of the property should be increased by the addition of five elements of value (hereinafter mentioned), which the Commission, either through error of law or by findings made without any evidence to support them, had eliminated. The defendants in error then appealed to the Supreme Court of Pennsylvania, which, in turn, reversed the order of the Superior Court and reinstated the order of the Commission. We respectfully aver, however, and are prepared to show, that the *Supreme Court of Pennsylvania in its decision ignored the real question in the case.* The Supreme Court of Pennsylvania did not attempt to make any findings of fact and treated the Commission's findings with respect to the said five elements of value as if the findings were, in reality, findings of fact, which they clearly were not. The Supreme Court of Pennsylvania then held (erroneously, as we maintain) that there was substantial evidence to support these findings of the Commission and that, therefore, no court had the power to pass upon them. *But this case does not involve a mere administrative question, inasmuch as the total annual revenue of the Water Company was fixed by the order of the Commission.* Nevertheless the Supreme Court of Pennsylvania treated the case as if it involved merely an *administrative question* and, on the ground that there was sub-

stantial evidence to support the Commission's findings, *held that the Water Company had no right to a judicial review of the question whether its property was confiscated in violation of the Fourteenth Amendment.* In reaching this result, the Supreme Court of Pennsylvania completely ignored the fact that the findings of the Commission with respect to the said five elements of value were either—

(1) Conclusions of law, or

(2) Findings of fact without any evidence to support them, or

(3) Findings where the facts and law were so intermingled that it was necessary for the court to analyze the facts in order to pass upon the question of Federal right.

We further respectfully maintain, and are prepared to show, that the Supreme Court of Pennsylvania also overlooked the fact that the findings of the Commission as to these five elements of value were clearly erroneous and resulted in a grossly inadequate valuation of the property of the Water Company and an annual return so low as to be confiscatory.

The five elements of value which were directed to be added by the Superior Court are the following:

Going value	$ 185,000.00
Additional interest during construction	28,601.33
Added value of Neville Island Real Estate	51,200.00
Added value of Monongahela Water Company Parallel Lines	42,661.00
Brokerage or discount on securities	92,415.47
Total	$ 399,877.80

Commission's valuation of property	924,744.00
Value of property under Superior Court's Opinion	$1,324,621.80

The Commission held that the Water Company was entitled to a gross annual revenue of $135,167.66 upon the valuation fixed by it (said annual revenue including operating expenses and depreciation as well as a return on capital) and, in figuring this gross annual revenue, it found as a fact that the Water Company was entitled to a fair annual return of 7% upon the value of its property over and above operating expenses and depreciation. The Commission, as stated, found the value of the property to be $924,744 and, therefore, found the fair annual return of 7% to be the sum of $64,732.08. Upon the sum of $1,324,621.80, which is the value of the property under the Superior Court's opinion, the fair annual return of $64,732.08 allowed by the Commission is about 4.88%. If, as we maintain, the value found by the Superior Court is correct, we respectfully submit that the return allowed is so low as to be plain confiscation.

There are two mortgages securing bond issues upon the plant of the Water Company. The first mortgage secures bonds of which $140,000 in par value are outstanding. The second mortgage secures bonds of which $860,000 in par value are outstanding and $140,000 in par value are reserved for exchange for the first mortgage bonds or for sale in order to pay the first mortgage bonds with the proceeds thereof. Inasmuch as the order of the Commission fixed the value of all the property of the Water Company

at a sum $185,000 less than its indebtedness, it has been impossible either to exchange the reserved $140,000 of second mortgage bonds for the first mortgage bonds or to sell said reserved second mortgage bonds and, as the credit of the Water Company has been ruined by this finding of the Commission, and as all of its physical property is mortgaged, it is impossible for the company to pay, or to make any provision for the payment of, the said $140,000 of first mortgage bonds. On January 1, 1918, the said $140,000 of first mortgage bonds became due and payable, all of them are unpaid and outstanding and a foreclosure of the mortgage securing the same may now occur any day. If the mortgage is foreclosed, it will mean the ruin of the company and is likely to result in a serious interference with the public service, not only on account of the demoralization, which would be the result of a foreclosure, but because the two mortgages cover different portions of the Water Company's property, each portion of which is vital to the proper supply of water to the public and yet the two portions may fall into different hands under the foreclosure proceedings. This is obvious because the second mortgage covers not only all of the property included in the first mortgage but a large amount of additional property which the first mortgage does not cover.

Entirely aside from the interests of the Water Company, we respectfully aver that the questions involved in this case are of such public importance and interest as to warrant the advancement of the case.

WHEREFORE, the plaintiff in error respectfully prays that the case be advanced and set for argument

at the earliest practicable date, allowing a short time for the preparation and service of the briefs.

Respectfully submitted,

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
Attorneys for Ohio Valley Water Company, Plaintiff in Error.

The defendants in error hereby join in the averment set forth in the foregoing motion to the effect that the questions involved in this case are of such public importance and interest as to warrant the advancement of the case and further join in the prayer that the case be advanced for argument.

DAVID L. STARR,
ALBERT G. LIDDELL,
LEONARD K. GUILER,
Attorneys for Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough and William B. Dawson, Defendants in Error.

THE PUBLIC SERVICE COMMISSION
OF THE
COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error,
By BERNE H. EVANS,
Its Attorney.

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Defendants in Error.

MOTION OF PLAINTIFF IN ERROR, TO ADVANCE THE REARGUMENT OF THE ABOVE CASE.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

1561 Frick Bldg. Annex,
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Defendants in Error.

Motion of Plaintiff in Error to Advance the Reargument of the Above Case.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiff in error in the above styled and numbered case moves and prays that said case be advanced for reargument for the following reasons:

The reasons set forth in the motion of plaintiff in error to advance the said case heretofore filed (a copy of which is hereto attached and marked "Exhibit A"),

which motion was allowed, still obtain and are even more urgent. Copies of the letters written by the Honorable J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, and by the Honorable George B. Orlady, President Judge of the Superior Court of Pennsylvania, which letters were filed with this Court at the time of presenting the said motion to advance the case, are hereto attached and marked, respectively, "Exhibit B" and "Exhibit C."

Wherefore, the plaintiff in error respectfully prays that the case be advanced and set for reargument at the earliest practicable date consistent with the convenience of the Court.

Respectfully submitted,

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,

Attorneys for Ohio Valley Water Company, Plaintiff in Error.

The defendants in error hereby join in the prayer that the case referred to in the foregoing motion be advanced for reargument as therein set forth.

DAVID L. STARR,
ALBERT G. LIDDELL,
L. K. GUILER,

Attorneys for Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough and William B. Dawson, Defendants in Error.

THE PUBLIC SERVICE COMMISSION
OF THE
COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error,

By BERNE H. EVANS,
Its Attorney.

EXHIBIT A.

IN THE

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WILLIAM WATSON SMITH,

Attorneys for Ohio Valley Water Company, Plaintiff in Error.

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BRIEF OF OHIO VALLEY WATER COMPANY, PLAINTIFF IN ERROR.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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IN THE

Supreme Court of the United States

NO. 128 OCTOBER TERM, 1919.

OHIO VALLEY WATER COMPANY, Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, Defendants in Error.

BRIEF OF OHIO VALLEY WATER COMPANY, PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before your Honorable Court upon a writ of error to the judgment of the Supreme Court of Pennsylvania allowed by Mr. Justice Pitney on May 27, 1918 (R., Vol. I, p. 1). The question involved is whether the plaintiff in error (herein sometimes called the "Water Company") has been deprived of its prop-

erty, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. The question is raised in connection with an order of the Public Service Commission of Pennsylvania, by which the Commission placed a certain value upon all the property of the Water Company and, on the basis of that value, specified the total annual revenue the company should be permitted to receive. From this order the Water Company appealed to the Superior Court of Pennsylvania, which unanimously reversed the Commission on the ground that the valuation was inadequate and the order of the Commission confiscatory. The defendants in error then appealed to the Supreme Court of Pennsylvania, which, in turn, reversed the order of the Superior Court and reinstated the order of the Commission. This judgment of the Supreme Court of Pennsylvania is brought before this Court by writ of error as stated above.

The Water Company is a Pennsylvania corporation incorporated in 1903. It subsequently purchased the property and franchises of a number of water companies having charter powers to operate in various portions of the district hereinafter mentioned. The district supplied is a large and populous territory in Allegheny County, Pennsylvania, lying on both sides of the Ohio River immediately west of, and contiguous to, the City of Pittsburgh, consisting of the Boroughs of Bellevue, Avalon, Ben Avon, Emsworth and West View and Ross Township, situate north of the Ohio River, the Borough of McKees Rocks, Stowe Township and Chartiers Township, situate south of the Ohio River, and Neville Township, comprising Neville Island situate in the Ohio River. The Water Company and its prede-

cessors have been supplying water to the public in the Boroughs of Emsworth, Ben Avon, McKees Rocks and West View for periods varying from approximately twelve to twenty years, and in the Boroughs of Bellevue and Avalon for over twenty years. The company's pumping station is located at the head of Neville Island, in the Ohio River, at which point the company owns a large sand bar which produces 4,500,000 gallons of pure, clear water daily, the same being taken from wells sunk in the sand bar, the water coming from the Ohio River after being filtered through a natural filter of some 20 feet of sand and gravel. The amount of water can be readily increased by drilling additional wells. The company owns a large and well constructed plant, which, in addition to the pumping station, consists of two reservoirs and over 90 miles of cast-iron pipe varying in diameter from 4 inches to 20 inches. It supplies between 9,000 and 10,000 separate families with water for domestic purposes, about 90 per cent. of the company's revenue being derived from domestic consumers, as it supplies very little water to manufacturers or other large users, and about 85 per cent. of the domestic consumers take their water by meter (R., Vol. II, pp. 652-653). The company also supplies water to the various boroughs mentioned for fire hydrants, etc. In May, 1913, the company purchased 97 per cent. of the capital stock of the Monongahela Water Company (R., Vol. I, p. 14), which was a large company formerly supplying water in the City of Pittsburgh and other territory, including the Borough of McKees Rocks, about 75 per cent. of the property of the Monongahela Water Company having been purchased by the City of Pittsburgh in 1909 (R., Vol. II, p. 675). The Monongahela Water

Company was already in process of liquidation and in 1914, in completing the liquidation, its pipe lines in McKees Rocks, etc., were transferred to the Ohio Valley Water Company (R., Vol. II, p. 681). Since November, 1914, the water of the Ohio Valley Water Company has been supplied to the public in McKees Rocks through its own mains and the mains formerly belonging to the Monongahela Water Company (R., Vol. II, p. 672).

Neither the Ohio Valley Water Company nor any of the companies purchased by it (except the Monongahela Water Company) has ever paid a dividend, except that the Ohio Valley Water Company, in the year 1910, paid a dividend of $4,036 and, in the year 1911, $6,053.90, and the Valley Consolidated Water Company, one of the predecessors of the Ohio Valley Water Company, paid dividends as follows: In 1902, $5,238.75; in 1903, $10,878; and in 1904, $9,000 (R., Vol. II, pp. 1073, 1074). If proper depreciation charges had been made, none of these dividends could have been paid. In December, 1913, the Water Company adopted a new schedule of rates, which rates are involved in this litigation (R., Vol. I, pp. 16, 478-479, 485). By the said rate schedule, among other increases, the meter rate for the amount of water used in ordinary domestic consumption (not over 25,000 gallons per quarter) was fixed at 40¢ (R., Vol. I, p. 16, Original, p. 27 No. [80]), except that a corresponding meter rate of 42½¢ was placed on a comparatively small amount of water supplied in the high service district in West View and in a small portion of Bellevue, which requires two pumping operations on account of the great elevation of the territory. As compared with the gross annual revenue of $135,167.66 allowed by the Public Service Commis-

sion as hereinafter set forth, the gross revenue of the Water Company for the calendar year 1914 was $162,249.82, applying the new rate schedule adopted by the company in December, 1913, to all the water supplied in 1914 for all purposes (R., Vol. I, p. 16, Original p. 29, next to last column). The year 1914 is taken to make this comparison because the taking of testimony in this case was concluded in the year 1915 before the figures showing the revenue of the Company for 1915 were available.

Prior to the adoption of the rates in controversy in this litigation, the rates charged by the Water Company for water in the Boroughs of Bellevue, Avalon, Ben Avon, Emsworth and McKees Rocks were in accordance with ordinances passed by the councils of said Boroughs, respectively, in which ordinances the rates of the Water Company were fixed for *an unlimited period*. For the quantity of water used in ordinary domestic consumption, the rates per thousand gallons fixed by these ordinances were as follows:

In the Borough of Bellevue,	20¢
In the adjoining Borough of Avalon,	30¢
In the Borough of Ben Avon,	30¢
In the Borough of Emsworth,	30¢
In the Borough of McKees Rocks,	35¢

The first ordinance fixing the rates was the Bellevue Ordinance, approved October 23, 1897 (R., Vol. II, p. 650), and the reason for the extraordinary low rate named in that ordinance was as follows: The uncontradicted evidence of Mr. Sloane, then the Assistant Secretary of the Bellevue Water Company, one of the predecessors of Ohio Valley Water Company, is that the construction of the Water Company's plant in the

Borough of Bellevue had been begun and was over half completed when the time allowed for completion under the first Bellevue Ordinance expired; that he believed the company would not be allowed to complete this work if an extension of time were not granted by the borough; that the question of obtaining an extension was discussed by the other officers of the company and it was decided to attempt to obtain such an extension and a request therefor was made upon the borough (R., Vol. II, pp. 651-652). The borough, thus having the company in a split stick (as the company's officers believed), proceeded to drive a very harsh bargain with the company and enacted Ordinance No. 212, a certified copy of which, marked Exhibit "J" (R., Vol. II, p. 1021), was offered in evidence (R., Vol. II, p. 650). This ordinance grants an extension of time *upon certain conditions*, one of which was, as provided in Section No. 2, that, in addition to the other requirements, the Water Company should supply water for operating the flushing tanks of a separate sewer system *free of all cost to the borough*. Another condition was provided in Section No. 9, namely, *a meter rate of 2¢ per 100 gallons, or 20¢ per 1,000 gallons,* for the water to be furnished to private consumers. A separate sewer flushing system was promptly built and the Water Company supplied water to it free of charge and submitted to this 20¢ meter rate for domestic consumption until December 30, 1913. If the officers of the Water Company had known their rights, they would not have been obliged to consent to the onerous terms of Bellevue Ordinance No. 212, as it has since been established by the Supreme Court of Pennsylvania that a water company, under its charter, has the right to lay its pipes

in the streets and is not obliged to obtain the consent of a municipality to such action: (*Dorrance vs. Bristol Borough*, 224 Pa., 464 [1909]; *New Cumberland Borough vs. Riverton Consolidated Water Co.*, 232 Pa., 531 [1911]).

The rates involved in this litigation were adopted for the purpose of removing the discriminatory features of the old rates and to provide a fair revenue for the company. The revenue under the old rates was totally inadequate.

On January 22, 1914, the Boroughs of Bellevue, Avalon, Ben Avon and Emsworth, together with certain citizens of each borough, filed bills in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, praying for preliminary injunctions, to be made perpetual on final hearing, to restrain the Water Company from collecting the new rates, etc. The bills were substantially similar and were filed on the theory that the Water Company had no right to raise its rates, because this was contrary to the terms of the various borough ordinances. The Common Pleas Court, on February 11, 1914, refused to grant a preliminary injunction in any of these cases on the ground that the ordinances were invalid, because they fixed the rates for *an unlimited period*. From this decision the various boroughs appealed to the Supreme Court of Pennsylvania, the case of the Borough of Bellevue being argued in that court at No. 73 October Term, 1914, the appeals of the other boroughs not being argued for the reason that the whole question was disposed of in the Bellevue case and, after the decision of the Supreme Court of Pennsylvania in the latter case, the appeals of the other boroughs were discontinued. In the Bellevue case, the

Supreme Court of Pennsylvania affirmed the opinion of the lower court (*Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pa., 114 [1914]). This decision of the Supreme Court of Pennsylvania has been acquiesced in by the defendants in error by proceeding before the Public Service Commission of Pennsylvania as hereinafter set forth—in fact in the appeal of the Water Company in this case from the order of the Public Service Commission to the Superior Court of Pennsylvania, the defendants in error filed a paper book or brief, in which it was expressly admitted (on page 7 thereof) that the contracts as to rates embodied in the borough ordinances are invalid. Notwithstanding the decision of the Supreme Court of Pennsylvania in the Bellevue case, *supra*, was handed down on April 20, 1914, no complaint was filed before the Public Service Commission until December, 1914, at which time the Boroughs of Ben Avon and Emsworth filed complaints. The Emsworth complaint was subsequently withdrawn and the Ben Avon complaint was not prosecuted, no evidence whatever being offered on behalf of Ben Avon, except that by consent of counsel and with the approval of the Public Service Commission (R., Vol. I, pp. 221-222), the affidavits of three real estate experts, Messrs. Hess, Heselbarth and Gibson, were filed by counsel for Ben Avon with the Commission on May 1, 1915. These affidavits are printed in the Record (Vol. II, pp. 870-872). The remaining boroughs, viz., Bellevue, McKees Rocks, Avalon and West View, and Stowe Township and W. B. Dawson did not file complaints with the Public Service Commission until July, 1915. These various complaints were heard, passed upon and treated by the Commission as one proceeding. The taking of testimony

in these cases was completed on December 31, 1915 (R., Vol. II, pp. 597 and 859); the cases were argued before three members of the Commission on January 13, 1916 (R., Vol. II, pp. 862 and 864), but the decision of the Commission was not made until February, 1917, in which month the report and order of the Commission, dated February 12, 1917, were filed. The valuation of the property of the Water Company as fixed by the Commission was made as of January 1, 1916 (R., Vol. I, p. 40). On that date the Water Company had outstanding $1,000,000 of bonds, $110,000 of floating debt and $1,000,000 of capital stock (all outstanding except $24.76) (R., Vol. I, p .13). *The Commission found that the total value of the property of the Water Company as of said date was $924,744; that is to say, according to this finding, the total value is $185,000 less than the said indebtedness of the company* (R., Vol. I, p. 40). On the basis of this value the Commission fixed the total annual revenue of the Water Company.

On March 1, 1917, the Water Company filed with the Commission a petition for a rehearing, etc. The Commission, on March 5, 1917, heard argument on said petition and, on March 29, 1917, filed a report on the petition in which a rehearing was refused (R., Vol. I, p. 53). *Commissioner Rilling was the only member of the Commission who heard the testimony and he was the only member who examined the property of the Water Company. He was one of only three members of the Commission who heard any oral argument of the case prior to the decision. Commissioner Rilling, on March 29, 1917, filed a vigorous dissenting report in which he held that both the valuation fixed by the Commission and the return allowed were inadequate* (R.,

Vol. I., p. 73). Under the Pennsylvania statute, which gives broad powers to the Superior Court of Pennsylvania on appeals from the Public Service Commission, the Water Company appealed from the order of the Commission to the Superior Court of Pennsylvania, and on October 8, 1917, *the Superior Court, after a careful examination of the evidence, unanimously reversed the Commission* on the ground that the valuation made by the Commission was inadequate and its order confiscatory (R., Vol. I., p. 94). The Superior Court held that the Commission's valuation of the property should be increased by the addition of five elements of value, which the Commission, either through error of law or by findings made without any evidence to support them, had eliminated. The five elements which were directed to be added by the Superior Court are the following:

Additional interest during construction	$ 28,601.33
Going value	185,000.00
Added value of Neville Island real estate	51,200.00
Added value of Monongahela Water Company parallel lines	42,661.00
Brokerage or discount on securities	92,415.47
Total	399,877.80
Commission's valuation of property	924,744.00
Value of property under Superior Court's opinion	$1,324,621.80

The Commission held (R., Vol. I, p. 39) that the Water Company was entitled to a gross annual revenue of $135,167.66 upon the valuation fixed by it (said annual revenue including operating expenses of $63,500 and depreciation of $6,935.58 as well as a return on capi-

tal). In figuring this gross annual revenue the Commission found that the Water Company was entitled to a fair annual return of 7 per cent. upon the value of its property, over and above operating expenses and depreciation (R., Vol. I, pp. 40 and 39). This case differs from every other rate case which has been before this court because *in this case this court has the benefit of a finding which specifies the rate per cent. which the Water Company is entitled to receive on the value of its property.* The Commission's finding as to this rate per cent. of return to which the company is entitled was affirmed by both the Superior Court and the Supreme Court of Pennsylvania (R., Vol. I, pp. 106, 121). This finding as to the rate per cent. of return, we submit, is one of the settled points in this case because, under the evidence and in view of the hazards to which the Water Company is subjected, we believe that, even if the attempt is made by counsel for the defendants in error, they will be wholly unable to induce this court to overturn the finding as to the 7 per cent. rate of return made by the Commission and concurred in by both the Pennsylvania courts. The Commission, as stated, found the value of the property to be $924,744.00 (R., Vol I, p. 38), and, therefore, found the fair annual return of 7 per cent. to be the sum of $64,732.08 (R., Vol. I, p. 39). *Upon the sum of* $1,324,621.80, *which is the value of the property under the Superior Court's opinion, the fair annual return of $64,732.08 allowed by the Commission is about* 4.88 *per cent.*

From the said decision of the Superior Court of Pennsylvania, the defendants in error, on November 7, 1917 (R., Vol., I, pp. 90-94), appealed to the Supreme Court of Pennsylvania, which court, in turn, on Febru-

ary 25, 1918, reversed the order of the Superior Court and reinstated the order of the Commission (R., Vol. I, p. 111). *But the Supreme Court of Pennsylvania, in its decision, ignored the real question in the case.* The Supreme Court of Pennsylvania did not attempt to make any findings of fact and treated the Commission's findings, with respect to the said five elements of value, as if the findings were in reality findings of fact, which clearly they were not. The Supreme Court of Pennsylvania then held (erroneously, as we maintain) that there was substantial evidence to support these findings of the Commission and that, therefore, no court ha the power to pass upon them. But this case does not involve a mere *administrative* question inasmuch as the total annual revenue of the Water Company was fixed by the order of the Commission. Nevertheless, the Supreme Court of Pennsylvania treated the case as if it involved merely an *administrative* question and, on the ground that there was substantial evidence to support the Commission's findings, *held that the Water Company had no right to a judicial review of the question whether its property was confiscated in violation of the Fourteenth Amendment.* In reaching this result, the Supreme Court of Pennsylvania completely ignored the fact that the findings of the Commission with respect to the said five elements of value were either—

(1) Conclusions of law, or

(2) Findings of fact without any evidence to support them, or

(3) Findings where the facts and law were so intermingled that it was necessary for the court to analyze the facts in order to pass upon the question of Federal right.

The Supreme Court of Pennsylvania also overlooked the fact that the findings of the Commission as to these five elements of value were clearly erroneous and resulted in a grossly inadequate valuation of the property of the Water Company and an annual return so low as to be confiscatory.

The Pennsylvania Public Service Commission is not a *judicial* tribunal but is merely an *administrative* body and is so described in the statute which creates it. The commission has power to institute proceedings of its own motion. Therefore, it acts to some extent as a public prosecutor, which would destroy its judicial character if it had any. Further, to show the non-judicial character of the Commission, under the Pennsylvania statute, the Commission is made a party to the suit and is directed to file an answer in the event of an appeal to the Superior Court—in the case at bar the Commission is a party, filed an answer in the Superior Court (R., Vol. I, p. 87), took an appeal to the Supreme Court of Pennsylvania, and is one of the defendants in error in this court.

Errors Assigned.

FIRST. The Supreme Court of Pennsylvania erred in entering the following judgment in the said case:

> "The order of the Superior Court is, therefore, reversed and the order of the Public Service Commission is reinstated; the costs in the Superior Court and in this Court to be paid by the Ohio Valley Water Co."

The judgment of the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

SECOND. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania, which order is as follows:

> "The order of the Commission is reversed and it is directed to reform its valuation in accordance with this opinion and upon such valuation it shall fix a schedule of rates which shall cover the expenses, depreciation, etc., and the return per cent. as found by the Commission to be fair."

The order of The Public Service Commission referred to in the said order of the Superior Court is as follows:

> "This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and

the Commission after full hearing and investigation having made and filed of record a report containing its findngs of fact and conclusions thereon, which report is hereby approved and made a part hereof:

Now, to wit, February 12th, 1917, the Ohio Valley Water Company is ordered and directed on or before March 1st, 1917, to file, post and publish a supplement to its tariffs, schedules, rules and regulations which shall carry into effect the determinations and conclusions of this Commission with regard to service and the charges therefor contained in the above mentioned report.

BY THE COMMISSION,
WM. D. B. AINEY,
Chairman.

[SEAL]

Attest:
A. B. MILLAR,
Secretary."

The supplement to the tariffs, schedules, rules and regulations of the Ohio Valley Water Company referred to in said order of the Commission, as prescribed by the Commission in its report, is as follows:

"RATE SCHEDULE.

Ready to Serve Schedule.

For all service except public fire service and service rendered on the flat rate basis, the following annual ready to serve charges shall be made:

For a 5/8" tap into the street main	$ 6.00 per annum
For a 3/4" tap into the street main	9.00 per annum
For a 1" tap into the street main	15.00 per annum
For a 1 1/4" tap into the street main	30.00 per annum

For a 2″	tap into the street main	50.00 per annum
For a 3″	tap into the street main	110.00 per annum
For a 4″	tap into the street main	200.00 per annum
For a 6″	tap into the street main	440.00 per annum

Meter Schedule.

All service of whatever kind rendered by the respondent to its patrons shall be on the meter basis on and after the time fixed in the order of the Commission. For all water used on the meter basis a charge of 12 cents per thousand gallons will, however, be made. The Commission will, however, consider an application from the respondent for permission to put in effect a schedule providing for a sliding scale of charges for metered service.

Public Fire Service Schedule.

For all public fire service the following yearly charges will be made:

For each public fire hydrant in each municipality	$ 7.00 per annum
For each mile of main 4″ or greater in diameter in each municipality where such main is used for public fire service	329.00 per annum

All public fire hydrants shall be separate and independent pipe lines connected directly to the water company's mains.

There shall be no service rendered free of charge.

All accounts shall be due and payable quarterly.

Revenue From Public Fire Service.

Municipality	Fire hydrants	Revenue at $7.00 per hydrant	Miles of main 4" or over in diam.	Revenue at $329 per mile	Total revenue
McKees Rocks Boro.	118	$ 826	15.50	$ 5,099.50	$ 5,925.50
Stowe Twp.	38	266	8.28	3,053.12	3,319.12
Bellevue Boro.	77	539	16.02	5,270.58	5,809.58
Avalon Boro.	55	385	7.42	2,441.18	2,826.18
Ben Avon Boro.	39	273	6.25	2,056.25	2,329.25
Emsworth Boro.	28	196	5.20	1,710.80	1,906.80
West View Boro.	43	301	14.10	4,638.90	4,939.90
Totals	398	$2,786	72.77	$24,270.33	$27,056.33
Ross Township	0	0	3.00	0	0
Chartiers Township	0	0	2.15	0	0"

The said order of the Commission, including said rate schedule, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

THIRD. The Supreme Court of Pennsylvania erred in not affirming the order of the Superior Court of Pennsylvania, which order is as follows:

> "The order of the Commission is reversed and it is directed to reform its valuation in accordance with this opinion and, upon such valuation, it shall fix a schedule of rates which shall cover the expenses, depreciation, etc., and the return per cent. as found by the Commission to be fair."

The said action of the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

FOURTH. The Pennsylvania Public Service Company Law, being an Act No. 854, approved July 26, 1913, P. L. 1374, as amended by an Act No. 345, approved June 3, 1915, P. L. 779, as further amended by an Act No. 311, approved July 11, 1917, P. L. 808, was interpreted by the Supreme Court of Pennsylvania as giving The Pennsylvania Public Service Commission power to fix the gross annual revenue and the total annual fair return to which the Ohio Valley Water Company is entitled and as limiting the Superior Court of Pennsylvania, on appeal from the order of the Com-

mission, to the determination of the question merely whether there was substantial evidence to support the Commission's order, and as denying to the Superior Court the right to reverse the Commission's order, notwithstanding, in the judgment of the Superior Court, on the whole case, the order of the Commission should be reversed because contrary to the weight of the evidence. The Pennsylvania Public Service Company Law, as thus interpreted by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property, without due process of law, and is, therefore, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

FIFTH. If the Pennsylvania Public Service Company Law is to be interpreted as meaning that the Courts, under the facts in this case, are without authority to reverse the order of The Pennsylvania Public Service Commission fixing the gross annual revenue and the total fair return to which the Ohio Valley Water Company is entitled, the Pennsylvania Public Service Company Law deprives the Ohio Valley Water Company of its property without due process of law and is, therefore, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

SIXTH. The Supreme Court of Pennsylvania erred in holding that under the provisions of The Pennsylvania Public Service Company Law the Courts are without authority to reverse the order of The Pennsylvania Public Service Commission fixing the gross annual revenue and the total annual fair return to which the Ohio Valley Water Company is entitled.

The said action of the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

SEVENTH. The Supreme Court of Pennsylvania erred in sustaining the action of The Pennsylvania Public Service Commission in not making an adequate allowance for going value in valuing the property of the Ohio Valley Water Company.

The action of the Commission on this question, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

EIGHTH. The Supreme Court of Pennsylvania erred in sustaining the action of The Pennsylvania Public Service Commission in not making an adequate allowance for interest during construction in valuing the property of the Ohio Valley Water Company.

The action of the Commission on this question, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

NINTH. The Supreme Court of Pennsylvania erred in sustaining the action of The Pennsylvania Public Service Commission in not making an adequate

allowance for the value of the Neville Island Real Estate in valuing the property of the Ohio Valley Water Company.

The action of the Commission on this question, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

TENTH. The Supreme Court of Pennsylvania erred in sustaining the action of The Pennsylvania Public Service Commission in not making an adequate allowance for the value of the lines of the Ohio Valley Water Company, known as the "Monongahela Water Company Parallel Lines" in valuing the property of the Ohio Valley Water Company.

The action of the Commission on this question, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

ELEVENTH. The Supreme Court of Pennsylvania erred in sustaining the action of The Pennsylvania Public Service Commission in not making an adequate allowance for brokerage or discount on securities in valuing the property of the Ohio Valley Water Company.

The action of the Commission on this question, thus sustained by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its prop-

erty without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

TWELFTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the first assignment of error filed by the Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and order of The Public Service Commission to the said Superior Court, which assignment of error is as follows:

"1. The Commission erred in making the following finding:

> 'The Commission has reached the conclusion that the aggregate fair value of all the items set forth in the said summary of audits and appraisements which have been allowed and which comprise the entire property of respondent that is used and useful in the public service it is now rendering to the several municipalities served by it, is nine hundred and twenty-four thousand, seven hundred and forty-dollars ($924,744.00) and that sum is the basis upon which its rate of return should be computed.'

The said amount fixed by the Commission is much less than the actual value of said property."

The said finding of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

THIRTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the second assignment of error filed by the Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

> "2. The Commission erred in making the following conclusion:
>
> > '4. The fair value of the respondent's property as it used and useful in its public service upon which to base its rate of return in addition to annual operating expenses and a proper allowance for depreciation, as of January 1, 1916, is nine hundred twenty-four thousand seven hundred forty-four dollars ($924,744.00).'
>
> The said amount fixed by the Commission is much less than the actual value of said property."

The said conclusion of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

FOURTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the fifth assignment of error filed by the Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and

order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

"5. The Commission erred in making the following finding:

'The Commission has determined that the respondent is entitled to 7 per cent. on the fair value of its property as ascertained herein as a fair return to the owners over and above its necessary and operating expenses and depreciation. The annual operating expenses we have fixed at $63,500.00 and the Commission is of opinion that an annual sum equal to ¾ of 1 per cent. of the fair value should be allowed for depreciation. This amounts to $6,935.58, which, added to the operating expenses and fair return, make a total gross annual revenue to be received by the respondent as follows:

Fair return 7%	$64,732.08
Annual operating expenses	63,500.00
Annual depreciation, ¾ of 1%	6,935.58
Gross revenue	$135,167.66.'

The gross revenue of $135,167.66 allowed by the Commission is wholly inadequate."

The said finding of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

FIFTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the seventh assignment of error filed by Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

"7. The Commission erred in making the following finding:

'The Commission has determined that the respondent is entitled to 7 per cent. on the fair value of its property as ascertained herein as a fair return to the owners over and above its necessary and operating expenses and depreciation. The annual operating expenses we have fixed at $63,500.00 and the Commission is of opinion that an annual sum equal to ¾ of 1 per cent. of the fair value should be allowed for depreciation. This amounts to $6,935.58, which, added to the operating expenses and fair return, make a total gross annual revenue to be received by the respondent as follows:

Fair return 7%	$64,732.08
Annual operating expenses	63,500.00
Annual depreciation, ¾ of 1%	6,935.58
Gross revenue	$135,167.66.'

The return of 7 per cent. on the value of the property, as ascertained by the Commission, viz., $64,732.08, is wholly inadequate."

The said finding of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

SIXTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the thirteenth assignment of error filed by Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

> "13. The report, findings, conclusions, ruling, determination and order of the Commission amount to a deprivation of property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States and of the first and tenth sections of the First Article of the Constitution of Pennsylvania."

The said action of the Commission as set forth in said assignment thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

SEVENTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the thirty-sixth assignment of error filed by

Ohio Valley Water Company in its appeal from the report, findings, conclusions, ruling, determination and order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

"36. The Commission erred in making the following finding in its report upon petition for rehearing, etc.:

'The Commission finds that the original cost of construction of the properties of the respondent at September 30, 1915, exclusive of working capital and without deducting depreciation is $841,343. Adding to this the amount of working capital as set forth above, namely, $10,000, and deducting the amount of depreciation as set forth above, namely, $68,-149, the Commission finds that the original cost of construction of the properties of respondent, less depreciation as at September 30, 1915, is $783,194.'

The original cost of construction was greatly in excess of said sum."

The said finding of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

EIGHTEENTH. The Supreme Court of Pennsylvania erred in reversing the order of the Superior Court of Pennsylvania by which the Superior Court had sustained the fortieth assignment of error filed by the Ohio Valley Water Company in its appeal from

the report, findings, conclusions, ruling, determination and order of the Public Service Commission to the said Superior Court, which assignment of error is as follows:

> "40. The Commission erred in making the following finding in its report upon petition for rehearing, etc.:
>
> > 'The Commission finds that the reproduction cost new of the properties of the respondent at September 30, 1915, would be $1,083,825; that the amount of accrued depreciation based upon the age of the property of the respondent would be $88,661, and that the amount of the reproduction cost new, less depreciation, would be $995,164.'
>
> The reproduction cost, less depreciation, is greatly in excess of said sum."

The said finding of the Commission thus sustained by the Supreme Court of Pennsylvania deprives the Ohio Valley Water Company of its property, without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

ARGUMENT.

Before arguing any of the questions at length, we respectfully submit the following summary in which we have compressed the essential features of the case into small compass.

Summary of the Argument.

We maintain that the Water Company has been deprived of its property without due process of law in violation of the Fourteenth Amendment by the order of the Public Service Commission of Pennsylvania reinstated by the Supreme Court of Pennsylvania. Our reason for this position is that the Commission's order fixed the total annual revenue of the Water Company at such a low figure as to be confiscatory because the order was based upon an *unduly low value* placed upon the Company's property by the Commission. With the permission of the court we will divide our argument into the following headings:

I.

(1) THE PERTINENT PROVISIONS OF THE PENNSYLVANIA PUBLIC SERVICE COMPANY LAW.

(2) THE PENNSYLVANIA PUBLIC SERVICE COMMISSION IS A LEGISLATIVE OR ADMINISTRATIVE, NOT A JUDICIAL BODY.

Subdivision (1) is self-explanatory.

Under subdivision (2) we will show that the Penn-

sylvania Public Service Commission is not a judicial body. It is described in the act creating it as an *administrative* body; it is permitted to become or be made a party to legal proceedings; it is given some of the powers of the public prosecutor, for example, the power upon its *own motion* to proceed against public service companies for violations of the law; in case of appeal from the commission's order to the Superior Court of Pennsylvania, the Commission is directed to file an answer; in the case at bar the Commission is a party and filed an answer in the Superior Court and took an appeal to the Supreme Court of Pennsylvania.

II.

ALTHOUGH THE COMMISSION'S ORDER FIXED IN DOLLARS AND CENTS THE TOTAL ANNUAL REVENUE OF THE WATER COMPANY, THE PENNSYLVANIA SUPREME COURT DISPOSED OF THIS CASE AS IF THE QUESTION OF CONFISCATION WERE MERELY A LEGISLATIVE OR ADMINISTRATIVE QUESTION.

THE PENNSYLVANIA SUPREME COURT NEITHER MADE ANY FINDINGS OF FACT ITSELF NOR DID IT HOLD THAT THE FINDINGS OF FACT OF THE PENNSYLVANIA SUPERIOR COURT WERE INCORRECT.

THE PENNSYLVANIA SUPREME COURT HELD THAT THE FINDINGS OF FACT OF THE COMMISSION MUST BE UPHELD IF SUPPORTED BY SUBSTANTIAL EVIDENCE, NOTWITHSTAND-

ING BY THE WEIGHT OF THE EVIDENCE THE SUPERIOR COURT HAD REACHED A DIFFERENT CONCLUSION.

This heading is self-explanatory.

III.

THE WATER COMPANY HAS BEEN DENIED A JUDICIAL INVESTIGATION OF THE QUESTION AS TO THE CONFISCATION OF ITS PROPERTY.

In the case at bar the Pennsylvania Public Service Commission fixed the entire schedule of rates and determined the entire annual revenue of the Water Company. The Superior Court of Pennsylvania, the only state court open to the Company in the first instance, set aside the order of the Commission on the ground that it was based upon a valuation much less than the true value of the Water Company's property. The Supreme Court of Pennsylvania reversed the decree of the Superior Court and reinstated the order of the Commission. It did so, not on the ground that the findings of fact made by the Superior Court were incorrect, but on the theory that the court could "not examine the facts further than to determine whether there was substantial evidence to sustain the order" of the Commission. The effect of the Public Service Company law as thus construed was to deprive the Water Company of its property without due process of law by denying it a proper hearing upon the question of confiscation. We will show by the decisions of

this court, as well as those of other tribunals, (a) that the order of the Public Service Commission in this case, fixing all the rates of the plaintiff in error, was purely a legislative act; (b) that the plaintiff in error was entitled under the Fourteenth Amendment to a judicial inquiry into the question whether this legislative act amounted to a confiscation of its property; (c) that the plaintiff in error was denied such a judicial inquiry in the State Courts by the construction given to the Public Service Company Law by the Court below, refusing to the State Court having the power to review the orders of the Commission the right to set them aside, merely because there was some substantial evidence to sustain them; and (d) that this denial of a constitutional right is not condoned by the fact that there was an alternative mode to obtain relief from the Commission's order, by suit in a Federal Court.

APPENDIX TO HEADING III.

THE PENNSYLVANIA SUPREME COURT STANDS ABSOLUTELY ALONE IN ITS POSITION IN THIS CASE. IN A CASE INVOLVING THE ENTIRE REVENUE OF A PUBLIC SERVICE CORPORATION NO COURT IN THIS COUNTRY HAS EVER ADOPTED A SIMILAR VIEW AS TO THE POWERS OF A COURT REVIEWING AN ORDER OF A COMMISSION. ON THE CONTRARY, THERE IS A GREAT WEIGHT OF AUTHORITY DIAMETRICALLY OPPOSED TO THE DECISION OF THE PENNSYLVANIA SUPREME COURT.

We will show not only that the extraordinary posi-

tion of the Pennsylvania Supreme Court is contrary to the views of this court, but that numerous State courts of the highest authority have reached a conclusion exactly the reverse of that of the Pennsylvania Supreme Court. In cases involving appeals under similar statutes from the orders of a Commission, the highest courts of Florida, Idaho, Massachusetts, New Hampshire, New Jersey, New York and Oklahoma have held that it is the duty of the court to determine, *upon the weight of the evidence*, whether there has been a confiscation of property. We have not found a single decision, nor do we believe the books contain one, which sustains the position of the Pennsylvania Supreme Court in a case where the total revenue of a public service company was fixed by order of a Commission.

IV.

THE COMMISSION PLACED TOO LOW A VALUE UPON THE PROPERTY OF THE WATER COMPANY.

The value of the company's property as fixed by the Commission is approximately $925,000; as found by the Superior Court of Pennsylvania it is approximately $1,325,000. On appeal by the Water Company from the Commission's order, the Superior Court of Pennsylvania, after a careful examination of the evidence, held that the Commission's valuation of the property should be increased by the addition of five elements of value which the Commission, either through error of law or by findings made without any evidence to support them,

had eliminated. The five elements of value thus directed to be added by the Superior Court are (a) additional interest during construction; (b) going value; (c) added value of Neville Island real estate; (d) added value of Monongahela Water Company parallel lines and (e) brokerage or discount on securities. These five subjects are discussed at length in the argument.

It is settled law that the Water Company is entitled to a fair return on the *present value* of its property.

V.

INASMUCH AS THE COMMISSION PLACED TOO LOW A VALUE UPON THE PROPERTY THE RETURN ALLOWED BY IT IS CONFISCATORY.

The Commission held that the Water Company is entitled to a gross annual revenue of $135,167.66 upon the valuation fixed by it (said annual revenue including operating expenses of $63,500 and depreciation of $6,935.58 as well as return on capital) and in figuring this gross annual revenue it found as a fact that the Water Company was entitled to a fair annual return of 7 per cent. upon the value of its property, over and above operating expenses and depreciation. The Commission found the value of the property to be $924,744 and, therefore, found the fair annual return of 7 per cent. to be $64,732.08. Upon the sum of $1,324,621.80, which is the value of the property under the Superior Court's opinion, the fair annual return of $64,732.08 allowed by the Commission is about 4.88 per cent. This is plain confiscation.

This case differs from every other case which has been before this court because *in this case this court has the benefit of a finding which specifies the rate per cent. which the Water Company is entitled to receive on the value of its property,* and this finding of the Commission as to the rate per cent. has been affirmed by both the Superior Court and the Supreme Court of Pennsylvania.

Inasmuch as the Commission fixed the gross annual revenue of the Water Company at $135,167.66, this is not a case where there should be a test of the rates to see whether they will prove confiscatory as has been done in certain cases where the gross annual revenue was not fixed but certain rates were prescribed.

VI.

THERE ARE NO FINDINGS OF FACT ADVERSE TO THE WATER COMPANY WHICH ARE BINDING UPON THIS COURT.

(It is not necessary to argue that this court will not be bound by the conclusions of law of another tribunal.)

There were absolutely no findings of fact made by the Supreme Court of Pennsylvania. There were no so-called findings of fact by the Commission as to the above mentioned five elements of value. While ordinarily this court will follow the findings of fact of a State court, there are well settled exceptions to the rule. This

court will never be bound by the findings of a State court where such findings are either

(1) Findings of fact without any evidence to support them, or

(2) Findings where the facts and law are so intermingled that it is necessary for the court to analyze the facts in order to pass upon the question of Federal right.

With respect to the said five elements of value directed to be added by the Superior Court, we will show that the findings of the Commission were either within the exceptions to the rule noted above or were conclusions of law and that these findings, whether of fact or law, were clearly erroneous. While we believe we can show that the Commission's findings with respect to the said five added elements of value, in so far as they are findings of fact, are not supported by *any* evidence we are not obliged to go so far, but, if we can show that they are not supported by *substantial* evidence, the findings of the Superior Court should be sustained. This is true for the following reasons: The Supreme Court of Pennsylvania did not itself attempt to find any facts nor did it hold that the findings of fact of the Superior Court were erroneous. The Supreme Court of Pennsylvania reversed the Superior Court on the following reasoning: (a) By holding that if there was substantial evidence to support the findings of the Commission no court has the power to reverse them, and (b) by holding that there was substantial evidence to support the findings of the Commission. We will show,

that, as to the five elements of value added by the Superior Court, the findings of the Commission were *not* supported by *substantial* evidence. If we can show this, the limitation placed on the powers of the Superior Court by the Supreme Court of Pennsylvania necessarily falls, because even the Supreme Court of Pennsylvania does not assert that the Superior Court is obliged to sustain the findings of the Commission if the findings are *not* based on *substantial* evidence. If this limitation upon the powers of the Superior Court falls, then, clearly, that court has the right to proceed to find the facts according to the evidence (and this it did) and we submit the findings of the Superior Court should be affirmed inasmuch as the Superior Court is the only court that made any findings of fact in this case, and those findings are supported by the weight of the evidence. Of course, the conclusions of law of the Supreme Court of Pennsylvania are not binding upon this court and we will show that its conclusions of law with respect to the five added elements of value were clearly erroneous.

VII.

THIS COURT WILL DETERMINE FOR ITSELF WHETHER THERE HAS BEEN A CONFISCATION OF PROPERTY.

We will cite a number of decisions holding that this court will pass upon the necessary questions, whether of law or fact, in order to determine whether there has been a confiscation of property in violation of the Fourteenth Amendment.

VIII.

THE SITUATION IN PENNSYLVANIA AS A RESULT OF THE DECISION IN THE CASE AT BAR.

To show the state of affairs in Pennsylvania by reason of the decision in the case at bar and the great injustice which has resulted therefrom, not only to the Ohio Valley Water Company but to other property owners, rendering the situation almost intolerable on account of the confiscation of property, we respectfully refer this court to the decision of the Superior Court of Pennsylvania in the later case of *Beaver Valley Water Company vs. Public Service Commission,* 71 Pa. Superior Court Rep., 43 (1919). In the *Beaver Valley case* the Superior Court held that the Commission had treated the Company unjustly by not allowing it the value of its property in a rate case but that the court was powerless to help the company in view of the decision of the Supreme Court of Pennsylvania in the case at bar. For the convenience of the court we are printing as an appendix to this brief the entire opinion of the Superior Court of Pennsylvania in the *Beaver Valley Water Company* case.

We respectfully submit that the existing situation in Pennsylvania amounts to nothing less than a denial of justice in these rate cases. The plaintiff in error and its stockholders are not only citizens of Pennsylvania but they are citizens of the United States. They have exhausted their legal remedies in Pennsylvania and apply to this court, as their last resort, in the confident belief that your Honors will not permit their property to be confiscated.

IX.

THE FINDINGS OF THE COMMISSION AS TO THE COST OF THE WATER COMPANY'S PROPERTY ARE INCORRECT AND MISLEADING.

It is not essential to our case that we argue this point, but we do not wish this court to be under a misapprehenstion as to the facts. The so-called "cost" of the property, as found by the Commission, is not actual cost but merely partial and incomplete *book cost*. Furthermore, the Commission has failed to give the Company credit for even so much of the actual cost of the property as is disclosed by the books.

X.

THE FEDERAL QUESTION WAS PROPERLY RAISED ON THE RECORD.

This is so clear that we do not believe our opponents will attempt to controvert it. However, the requirement that the Federal question be raised on the record is fundamental and we will show, briefly, that this has been done.

(End of Summary of Argument.)

As we have pointed out in the statement of the case (*Ante*, p. 9) the entire property of the plaintiff in error (herein sometimes called the "Water Company") was valued by the Commission as of January 1, 1916, on which date the company had outstanding $1,000,000 of bonds, $110,000 of floating debt, and $1,000,000 of capital stock (R., Vol I, pp. 40 and 13). The majority of the members of the Commission found that the total value of the property of the Water Company, as of said date was $924,744, *which is $185,000 less than the said indebtedness of the company.* It is, of course, true that, if the company's property is worth $185,000 less than the debts, it should be so valued, but we submit that, before reaching such an extraordinary and disastrous result, any tribunal should consider the question carefully and be fairly sure of its ground. To begin with, in this case, we have the dissenting report of Commissioner Rilling (R., Vol. I, p. 73) in which he held that both the valuation and the return allowed were inadequate. Commissioner Rilling was the only member of the Commission who heard the testimony, he was the only member who examined the property of the Water Company and he was one of only three members of the Commission who heard any oral argument in this case prior to the decision. The Superior Court of Pennsylvania carefully examined the evidence and unanimously reversed the Commission on the ground that the valuation made by the Commission was inadequate and its order confiscatory. The Supreme Court of Pennsylvania reversed the Superior Court, *but the Supreme Court neither made any findings of fact itself nor did it hold that the findings of the Superior Court were erroneous. The Supreme Court took the extreme and (as we main-*

tained) untenable position, that it made no difference whether the findings of the Superior Court were correct or incorrect, but that the Superior Court was absolutely concluded by the findings of the Commission, if such findings were based upon substantial evidence, and this without regard to the weight of the evidence. The Supreme Court of Pennsylvania then held (as if this case involved a mere *legislative* or *administrative* question) that there was substantial evidence to support the findings of the Commission and that, therefore, no court had the power to set them aside. If this be law, in a case involving the entire revenue of a public service company, the Fourteenth Amendment might as well be expunged from the Constitution. On this theory, approval of the Commission's order by a rubber stamp would save time and afford equal protection. Rate cases or condemnation cases always depend, in large part, upon expert testimony and any one familiar with that subject knows how easy it is for a complainant to find an expert or two who will, under oath, place a low value upon the property of a public service company. If then, the Commission finds as a fact that this low value is the actual value, such finding will be based upon substantial evidence and that is the end of the case. It will not matter in the slightest degree that, by the weight of the evidence, the complainant's experts are clearly shown to be wrong. If there is any class of cases which should be decided according to the weight of the evidence, it is this class. The principle laid down by the Supreme Court of Pennsylvania would turn the public service corporations over bodily to the tender mercies of these Commissions and, no matter how respectable may be their membership, they should

not be vested with any such arbitrary power. As stated by a recent writer on the subject:

> "Already there has arisen the fear that these public bodies set to solve given problems, may develop into tyrannous institutions, amenable to no law and subject only to the doubtful safeguards of political action."

("The Expansion of American Administrative Law," by *A. A. Berle, Jr., Harvard Law Review* for March, 1917, Vol. 30, p. 430.") Unanswerable as it seems to us, however, we do not need to rely upon this argument alone, as we expect to be able to show your Honors that, with respect to the five elements of value directed to be added by the Superior Court, the Commission's findings are *not* based upon substantial evidence and that consequently the decision of theh Superior Cour is right even if the extreme doctrine announced by the Supreme Court of Pennsylvania should be sustained, because even the Supreme Court of Pennsylvania concedes that the Superior Court may set aside the findings of the Commission if those findings are not based upon *substantial* evidence.

HEADING I.

(1) THE PERTINENT PROVISIONS OF THE PENNSYLVANIA PUBLIC SERVICE COMPANY LAW.

(2) THE PENNSYLVANIA PUBLIC SERVICE COMMISSION IS A LEGISLATIVE OR ADMINISTRATIVE, NOT A JUDICIAL BODY.

We respectfully direct the attention of this court to

(1) The pertinent provisions of the Pennsylvania Public Service Company Law.

The Pennsylvania Public Service Company Law is the Act of Assembly of the Commonwealth of Pennsylvania approved July 26, 1913, Pamphlet Laws, page 1374, as amended by the Act approved June 3, 1915, Pamphlet Laws, page 779 (*Purdon's Digest,* 13th Edition, Vol. 6, pages 7206-7239), as amended by the Act approved July 11, 1917, Pamphlet Laws, page 808. The principal purpose of the amendment of 1915 was to substitute the Superior Court for the Court of Common Pleas of Dauphin County as the court of first instance on appeals from the Commission. Article IV, Secs. 1 and 2, of the act are as follows (*Purdon's Digest,* Vol. 6, p. 7218):

> "SECTION 1. For the purpose of regulating public service companies and of carrying out the provisions of this act, an *administrative* body or commission is hereby established, to be known as

the public service commission of the Commonwealth of Pennsylvania; and in that name it shall issue its orders and certificates, and *may become or be made a party to legal proceedings.* * * *

"SECTION 2. This commission shall consist of seven members, who shall be appointed by the governor, by and with the advice and consent of the senate. Each commissioner at the time of his appointment and qualification shall be a resident of the Commonwealth of Pennsylvania, and shall have been a qualified elector therein for a period of at least one year next preceding his appointment, and shall also be not less than thirty years of age."

(The italics are ours.)

Article V, Secs. 2 and 3, of the act are as follows (*Purdon's Digest*, Vol. 6, p. 7222):

"SECTION 2. Whenever the Commission shall determine, after hearing had *upon its own motion*, or upon complaint, as hereinafter provided, that the service, facilities, rules, regulations, practices, or classifications of any public service company, in respect to, or in connection with, or employed by, or in the performance of, its public duties within this Commonwealth, are unsafe, inadequate insufficient, unjust, or unreasonable, the commission shall determine, and specify by an order in writing to be made and filed as hereinafter provided, and to be served as hereinafter provided upon every public service company to be affected thereby, the just, reasonable, safe, adequate, and sufficient service, facilities, rules, regulations, or practices thereafter to be put in force, observed, rendered, used

or furnished in the performance of its public duties by said public service company or companies; and thereupon it shall be the duty of every public service company affected by said order to observe and obey said order, and all and every the mandates and requirements thereof.

SECTION 3. Whenever the commission shall determine, after hearing, had *upon its own motion,* or upon complaint, that the rates, fares, tolls, or charges, established, demanded, exacted, charged, or collected by any public service company or companies, for any service rendered or furnished, are unjust or unreasonable or inadequate, or are unjustly discriminatory or unduly or unreasonably preferential; or that the facilities or service furnished or rendered by any public service company or companies are unjustly discriminatory, or unduly or unreasonably preferential; in favor of or against any particular person, corporation, locality, or any particular kind or description of traffic or service,—then the commission shall determine, and prescribe by a specific order, the maximum, just, due, equal, and reasonable rates, fares, tolls, and charges to be thereafter established, demanded, exacted, charged or collected for the service to be performed; and the just, due, equal, reasonable, and proper regulations and practices, as affecting such rates, to be observed by the public service company; and the commission may classify such rates." * * * (The italics are ours.)

The provisions as to appeals are found in Article VI (*Purdon's Digest,* Vol. 6, pages 7230-7235). The provisions pertinent to the case at bar are as follows:

Article VI, Sec. 17 of said Act of 1913 as amended by said Act of 1915 (*Purdon's Digest,* Vol. 6, p. 7233):

"SECTION 17. Within thirty days after filing of any finding or determination by the commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom *to the Superior Court.*"

(The italics are ours.)

Also Article VI, Secs. 18, 22, 23, 24, 25 and 26 (*Purdon's Digest,* Vol. 6, pp. 7234-7235):

"SECTION 18. The commission shall be immediately notified in writing by the appellant or appellants of the taking of an appeal, and within thirty days after service of such notice shall *certify* under its official seal to the proper court of common pleas (the words 'of common pleas' stricken out by said Act of 1917, P. L. 808) as hereinabove provided, the *record* of the said proceedings; *which record shall include the testimony taken therein,* the findings of fact, if any, of the commission based upon such testimony (the word 'testimony' stricken out and 'evidence' substituted by said Act of 1917, P. L. 808), a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission. The cost of preparing and certifying such record shall be paid to the commission by the appellant or appellants, and

taxed as part of the costs in the case, to be paid as directed by the court upon the final determination of the appeal.

SECTION 22. At the hearing of the appeal the said court shall, *upon the record certified to it by the commission,* determine whether or not the order appealed from is *reasonable* and in conformity with law.

SECTION 23. In all such cases the orders of the commission shall be *prima facie evidence of the reasonableness thereof,* and the burden of proving the contrary shall be upon the appellant or appellants; and the *notes of testimony* taken before the commission or any of the members thereof, *duly certified* under its seal, and filed as aforesaid as a part of the record, shall be *considered by the court as the testimony in the case.*

SECTION 24. If the court shall, *upon the record* find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, *upon the record,* find that the order appealed from is *unreasonable or based upon incompetent evidence* materially affecting the determination or order of the commission, or is *otherwise not in conformity with law,* it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law. In case the said court shall reverse an order of the commission dismissing a com-

plaint, after an investigation and hearing thereon before the commission, it shall remand the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of all costs.

SECTION 25. No evidence shall be received at the hearing on any appeal; but if any party shall satisfy the court that evidence has been discovered since the hearing before the commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the commission, with directions to take such after-discovered evidence, and, after consideration thereof, enter and file such order as shall in the opinion of the commission be reasonable and in conformity with law, from which order an appeal shall lie as in the case of any other final order.

SECTION 26. In all actions and proceedings in said court arising under this act process shall shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided."

(The italics are ours, also the clauses in parentheses in Section 18.)

In case of an appeal from an order of the Commission to the Superior Court the act requires the Commis-

sion to file an answer as follows (Article VI, Sec. 21, Purdon's Digest, Vol. 6, p. 7234):

"SECTION 21. *An answer shall be filed by the commission* within thirty days after the service of notice upon it of the taking of an appeal. Leave may also be given by the court to any other party to the record to file an answer. Upon the filing of an answer by the commission the case shall be considered at issue, and a hearing shall be held before said court as hereinafter provided, without further pleadings. Copies of the petition and answer shall be served upon the opposite party or parties within five days after filing the same."

(The italics are ours.)

Section 30 of Article VI of the Act of 1913 as amended by said Act of 1915 was as follows (Purdon's Digest, Vol. 6, p. 7235):

"SECTION 30. Any party to the record aggrieved by the final judgment, order or decree of the aforesaid superior court, or of the court of the county, whenever under the provisions of this act an appeal may in the first instance be taken to said court, may appeal therefrom to the supreme court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the supreme court from the courts of common pleas of the commonwealth."

It is significant that Section 30 of Article VI was urther amended by the said Act of 1917, P. L. 808, to ead in part as follows:

"SECTION 30. Within thirty days after the

entry of any final judgment, order, or decree of the aforesaid Superior Court, any party to the record aggrieved thereby, may appeal therefrom to the Supreme Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be specially allowed by the Superior Court itself, or by any one justice of the Supreme Court. Such appeals shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

The plain purpose of this amendment was to limit the right of appeal from the decisions of the Superior Court.

(2) The Pennsylvania Public Service Commission is a legislative or administrative, not a judicial body.

We respectfully request your Honors to note that the Pennsylvania Public Service Commission is not a judicial body. It is described in the act creating it as an *administrative* body and is permitted to become or be made a party to legal proceedings (Article IV, Sec. 1.) (*Ante*, p. 43) The Commission is given some of the powers of the public prosecutor, for example, it is given the power upon its *own motion* to proceed against public service companies for violations

of the law (Article V, Secs. 2 and 3, *Ante,* p. 44). Therefore, the same statement can be made concerning the Pennsylvania Commission that was made by the New Jersey Court in the case of *Public Service Gas Company vs. Public Utility Commissioners,* 84 N. J. L., 463 (1913) (at p. 467):

> "The presumption in favor of the acts of a judicial or quasi-judicial tribunal does not apply with the same force to a legislative tribunal, nor to a tribunal which possesses not only to some extent the powers of a court but also to some extent *the powers of a public prosecutor.* A legislative body prescribing a rule for future conduct is not limited by the same considerations of justice as a tribunal required to do justice in accordance with existing rules; and *one in the position of a public prosecutor can hardly be supposed to preserve a judicial frame of mind; he is rather in the position of one who is judge in his own cause.* Under the Public Utilities act, the commissioners are given extensive powers of legislation, and are given the power of initiating proceedings themselves."
>
> (The italics are ours.)

Further, to show the non-judicial character of this body in case of appeal from the Commission's order to the Superior Court, the Commission is directed to file an answer (Article VI, Sec. 21, *Ante,* p. 49). In the case at bar the Commission is a party and filed an answer in the Superior Court and took an appeal to the Supreme Court of Pennsylvania.

HEADING II.

ALTHOUGH THE COMMISSION'S ORDER FIXED IN DOLLARS AND CENTS THE TOTAL ANNUAL REVENUE OF THE WATER COMPANY, THE PENNSYLVANIA SUPREME COURT DISPOSED OF THIS CASE AS IF THE QUESTION OF CONFISCATION WERE MERELY A LEGISLATIVE OR ADMINISTRATIVE QUESTION.

THE PENNSYLVANIA SUPREME COURT NEITHER MADE ANY FINDINGS OF FACT ITSELF NOR DID IT HOLD THAT THE FINDINGS OF FACT OF THE PENNSYLVANIA SUPERIOR COURT WERE INCORRECT.

THE PENNSYLVANIA SUPREME COURT HELD THAT THE FINDINGS OF FACT OF THE COMMISSION MUST BE UPHELD IF SUPPORTED BY SUBSTANTIAL EVIDENCE, NOTWITHSTANDING BY THE WEIGHT OF THE EVIDENCE THE SUPERIOR COURT HAD REACHED A DIFFERENT CONCLUSION.

An examination of the opinion of the Supreme Court of Pennsylvania (R., Vol. I, p. 111), shows that the Pennsylvania Supreme Court made no findings of fact itself nor intimated that the findings of fact of the Pennsylvania Superior Court were incorrect. The Pennsylvania Supreme Court contented itself with holding that no matter what were the facts the findings of

the commission must be upheld if supported by substantial evidence notwithstanding that by the *weight of the evidence* these findings were shown to be incorrect and confiscatory. This clearly appears from an examination of the opinion as a whole. We respectfully request your Honors' particular attention to the following significant paragraphs from the opinion:

The Pennsylvania Supreme Court quotes the following language as applicable to the case at bar (R. Vol. 1, p. 114):

* * * "the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Pennsylvania Supreme Court said (R., Vol. I, p. 115):

"It is, therefore, to be regarded as a settled principle that, under such legislation as that with which we are here dealing, in an appeal from an order of the Public Service Commission, the inquiry by the court is not, whether the order is such as the court would have made in the exercise of administrative functions, but whether the order was a reasonable exercise of the discretion conferred upon the Commission by the statute. *In other words, the court is not to substitute its judgment as to rates or values, for that of the Commission.*"

(The italics are ours.)

Again (R., Vol. I, p. 121):

"A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed

from the Commission upon the question of values, there was merely the substitution of its judgment for that of the Commission, in determining that the order of the latter was unreasonable."

The doctrine laid down by the Pennsylvania Supreme Court in this case is strikingly shown by its consideration of the question raised as to the value of the Neville Island property of the Water Company. Upon that point the court, after commenting on the evidence of Messrs. Hice and Leaf, experts called by the defendants in error, making this statement (R., Vol. I, p. 117):

"If the Commission credited the testimony of this nature which was presented it would beyond question have been warranted in finding from the evidence, that the sand bar upon which the Water Company located its wells had no special value as a source of water supply over other land in the vicinity."

It should be noted in this connection that the court does not comment upon the evidence of the witnesses of the plaintiff in error, but distinctly announces that if the Commission credited the testimony of the witnesses of the defendants in error it would have been warranted in the conclusion reached by the Commission as to the value of this portion of the property. Further, with respect to the value of the parallel lines of the Monongahela Water Company, the Pennsylvania Supreme Court said (R., Vol. I, p. 118):

"The determination of what was necessary, and what was over-development under the circum-

stances, was clearly within the proper function of the Commission, and where, as here, the finding is sustained by competent evidence, and no abuse of discretion is shown, the finding should not be disturbed by the Court on review."

We submit that it is perfectly manifest from a reading of the opinion that the Pennsylvania Supreme Court held that the Commission's findings of fact were to be upheld if supported by substantial evidence, and that the Superior Court had no power to pass upon the weight of the evidence. We do not believe that the counsel for the defendants in error will attempt to argue in this court that the Pennsylvania Supreme Court did not so hold.

That the Pennsylvania Supreme Court considered that the case presented a mere legislative or administrative question (although the question of confiscation was involved) is shown to a demonstration by the decisions cited and the language quoted therefrom in support of its ruling. Referring to the case of *B. & O. R. R. Co. vs. Public Service Commission,* 66 Pa. Superior Court, 403, which involved merely the rates on milk, the Supreme Court of Pennsylvania said (Record Vol. I, p. 113):

"This concise interpretation of our statute, defining the function of the Court in dealing with appeals from the orders of the Public Service Commission, is in accord with the general principle announced in the decisions of the Supreme Court of the United States dealing with appeals from the orders of the Interstate Commerce Commission, and it is also in harmony with the decisions of the

Supreme Courts of various States, dealing with appeals from the orders of Public Service Commissions. Thus in *Interstate Commerce Commission vs. Illinois Central Railroad,* 215 U. S., 452, 470, the Supreme Court of the United States pointed out that the court may not, 'under the guise of exerting judicial power, usurp merely *administrative* functions by setting aside a lawful *administrative* order upon our conception as to whether the *administrative* power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it, is the question.' "

(The italics are ours.)

The Pennsylvania Supreme Court said further (R., Vol. I, p. 114):

"The Supreme Court of Minnesota, dealing with the same question, in *State vs. Great Northern R. R.,* 130 Minn., 57, tersely said (p. 59):

'The principle on which the Court acts in determining whether or not an order of the Commission is reasonable, has been the subject of much controversy, but the law upon the subject is now well settled. The Legislature never intended that the Court should put itself in the place of the Commission and try the matter anew as an *administrative* body, substituting findings for those of the Commission. * * * The Courts must not usurp *legislative* or *administrative* functions by setting aside a *legislative* or *administrative order* on their own conception of its wisdom.' "

(The italics are ours.)

Every case, except *Mt. Union Borough vs. Mt. Union Water Company*, 63 Pa. Superior Ct., 337 (1916), which the Pennsylvania Supreme Court cites as authority for its position that the findings of the Commission must be sustained, if supported by substantial evidence and without regard to the weight of the evidence, involves merely a *legislative* or *administrative* question and does not involve the question of confiscation. These cases are:

Interstate Commerce Commission vs. Ill. Central R. R., 215 U. S., 452 (1910) in which the question was as to the distribution of coal cars;

Interstate Commerce Commission vs. U. P. R. R., 222 U. S., 541 (1912), which involved the rates on lumber in certain territory;

People vs. McCall, 245 U. S., 345 (1917), in which the question was whether a gas company should supply a certain territory in which there were some 330 houses to which gas could be supplied from no other source. (See *People vs. McCall*, 219 N. Y., 84 (1916);

State vs. Great Northern R. R., 130 Minn., 57, (1915) which involved the operation of a Sunday train;

B. & O. R. R. Co. vs. Public Service Commission, 66 Pa. Superior Court, 403 (1917), which involved the rates on milk.

The case of *Mt. Union Borough vs. Mt. Union Water Company*, 63 Pa. Superior Ct., 337 (1916), involved the rates of a water company and, instead of supporting the position of the Supreme Court of Pennsylvania on the point in question, is directly contrary thereto because the opinion shows (p. 343) that the

Superior Court examined the evidence on both sides and found that the *preponderance of the evidence* supported the finding of the Commission.

The distinction between a *legislative or administrative* question and a *judicial* question is clearly indicated in *People vs. McCall*, 245 U. S., 345, *supra*. In that case there was evidence that the particular line of pipe in question would not pay a reasonable return, but there was no attempt to show that the gas company would not receive a fair return on its entire property, including the particular line in question. This distinction is carefully pointed out by this court in its opinion (p. 350). A public service company is not necessarily entitled to an adequate return on every particular line of pipe it lays. It is entitled to an adequate return upon the value of its entire property which is the question in the case at bar.

Further, in *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585 (1915) this court, speaking by Mr. Justice Hughes, said (p. 599).

> "As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. *San Diego Land & Town Co. vs. Jasper*, 189 U. S. 439; *Louisville & Nashville R. R. vs. Garrett*, 231 U. S. 298, 313. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a *particular tariff or schedule* which yields substantial compensation for the services it embraces, *when the profitableness of the intrastate business as a whole is not involved.*

But a different question arises when the State has segregated a commodity, or a class of traffic and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted."

(The italics are ours.)

In *Interstate Commerce Commission vs. Union Pacific Railroad*, 222 U. S. 541, (1912), this court, speaking by Mr. Justice Lamar, points out (p. 548) that there was no appeal from the Master's finding to the effect that the carriers could not determine the cost of the traffic (lumber) involved in that case, and this court further points out (p. 549) how much more difficult it is for a court to determine that a commission's finding as to a particular rate is unreasonable than where the commission has fixed the rates as a whole. On this point this court said (p. 549):

"Where the rates as a whole are under consideration there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return."

In those rare cases where the action of a commission in fixing a rate or in ordering an expenditure of money can be shown to be arbitrary and without justification the judicial question of confiscation is presented. In all other cases involving only a part of the revenue of a public service company, for example, where rates are fixed on a certain commodity or in a particular dis-

trict, the judicial question of confiscation is not raised unless it can be shown that by the action in question the entire revenue of the company is rendered inadequate. In the absence of such proof the court is bound to hold that the commission acted merely on a legislative or administrative question. But where the *total revenue* is fixed by the commission's order (or the revenue from an entire branch of the business—as, for example, the passenger business of a railroad (*Norf. & West. Ry. vs. West Va.*, 236 U. S., 605), and it is claimed that the order is confiscatory the judicial question of confiscation is necessarily raised—the claim may not be borne out by the facts, but the question is raised and is for the court to determine. The distinction between the two lines of cases is that where only a part of the revenue is affected it is, except in rare cases, impossible to show as a practical proposition that there has been confiscation, whereas where the entire revenue, or the revenue from an entire branch of the business, has been fixed this difficulty in offering the necessary proof of confiscation disappears. The cases in this court can be readily classified by the use of this distinction and, as we have just pointed out, the distinction was indicated by this court in two very recent cases, viz., *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585 (at p. 599) and *Interstate Commerce Commission vs. Union Pacific R. R.*, 222 U. S., 541, at p. 549).

HEADING III.

THE WATER COMPANY HAS BEEN DENIED A JUDICIAL INVESTIGATION OF THE QUESTION AS TO THE CONFISCATION OF ITS PROPERTY.

We will maintain in a later part of our argument (pp. 209 *et seq.*), that the order of the Pennsylvania Public Service Commission in this case, fixing the entire annual revenue to which the plaintiff in error should be entitled, was based upon an erroneously low valuation of its property and amounted to a confiscation thereof in violation of the Fourteenth Amendment to the Constitution. That argument is relevant upon this writ of error, by whatever process the illegal result has been arrived at. But we submit a reversal is called for in this case upon another and independent ground, namely, that the plaintiff in error has been deprived of its property without due process of law by being denied a judicial inquiry into the constitutional question as to confiscation. Inasmuch as this contention, if it be upheld, will preclude the necessity of an inquiry into the particular facts of this case, we invite the Court's attention to it before dwelling upon the facts.

The Pennsylvania Public Service Commission, as we have shown, is an administrative body to which the State legislature has delegated its power to fix the rates to be charged by public service companies. All questions as to such rates are to be determined in the

first instance by that body. The courts of the State are prohibited from inquiring into the legality of rates fixed by the Commission, save on appeal from it and on the testimony presented to it.

Bellevue Borough vs. Ohio Valley Water Company, 245 Pennsylvania, 114 (1914), per Elkin, J., at p. 116:

> "Hereafter, so long as the Act of 1913 remains in force, the question of the reasonableness of rates established by public service corporations, must in the first instance be submitted to the Public Service Commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well."

York Water Co. vs. York, 250 Pennsylvania, 115 (1915), per Elkin, J., at pp. 118-119:

> "The Public Service Company Law was intended to provide a complete system for the supervision and regulation of public service corporations, and the intention of the legislature to repeal or supply all former acts inconsistent therewith is clearly expressed in the language of the statute. The purpose of the ordinance in question here was to prevent what was declared to be the exaction of unjust and exorbitant charges from a certain class of consumers, but this is a subject clearly within the powers of the Public Service Commission, and hence we are confronted with the situation that both bodies are vested with the same powers or that one must give way to the other. There should be no difficulty in deciding which horn of the dilemma

the legislature intended to be taken. There can be no reasonable doubt that the legislative intention was to make the Public Service Act the supreme law of the State in the regulation and supervision of public service corporations, and this being so, it follows as a necessary sequence that all laws inconsistent with the powers thus conferred must be held to be repealed or supplied thereby. * * * The Public Service Company Law was intended to establish a complete and uniform system throughout the State for the enforcement of such powers as were conferred upon the Public Service Commission by that statute, and even if the act did not so provide in express terms it would operate as a repeal of former statutes inconsistent with its provisions."

St. Clair Borough vs. Tamaqua & Pottsville Electric Ry. Co., 259 Pennsylvania, 462 (1918), per Moschzisker, J., at pp. 466-467:

"As before stated, the court below did not attempt to adjudge as to the binding force of the alleged contract here in question, *i. e.*, the ordinance of 1906, but evidently based its decision upon our ruling in the Bellevue Borough case, to the effect that questions of rates to be charged by public service corporations must be passed upon in the first instance by the Public Service Commission, before any aspect of the matter involved can be brought before the courts for determination; and in this we see no error.

"The Act of 1913, *supra*, does not deprive the courts of any ultimate power theretofore vested in

them under the laws of the Commonwealth; it requires merely that, when a rate is to be or has been increased by a public service corporation, all complaints concerning the change shall be first submitted to and passed upon by the Public Service Commission. In turn, the decision of the commission is subject to review, and the courts are vested with the right and fixed with the duty of passing upon the record brought up on appeal (*Boro. of Mt. Union vs. Mt. Union W. Co.*, 256 Pa., 516, 518), 'which record shall include the testimony taken therein, the findings of fact, if any, of the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission' (Article VI, Section 18)." *Klein-Logan Co. vs. Duquesne Light Co.*, 261 Pennsylvania, 526 (1918), per Wasson, J., in the court below (whose opinion was adopted by the Supreme Court), at page 528:

"The Courts of Pennsylvania no longer have jurisdiction except upon appeal from a determination by the Public Service Commission."

See also *New Brighton Borough vs. New Brighton Water Company*, 247 Pennsylvania, 232 (1915), per Moschzisker, J., at p. 241;

Borough of Mt. Union vs. Mt. Union Water Co., 256 Pennsylvania, 516 (1917), per Head, J., in the court below (whose opinion was adopted by the Supreme Court), at pp. 518-519.

The Superior Court, which on "appeal" from the Commission determines "whether or not the order ap-

pealed from is reasonable and in conformity with law." is a judicial body and acts as such. This appears from the character of the duty entrusted to it and from the division of governmental powers made by the Constitution of Pennsylvania (Articles II, IV and V). See Purdon's Digest, 13th ed., vols. 4 and 6, title "Superior Court." *Cf. Wilmington City Ry. Co. vs. Taylor*, 198 Fed. Rep., 159 (D. C., Delaware, 1912), per Bradford, District Judge, at pp. 191-192; *Bacon vs. Rutland R. R. Co.*, 232 U. S., 134 (1914), per Mr. Justice Holmes, at p. 138; *Manufacturers' Light & Heat Co. vs. Ott*, 215 Fed. Rep., 940 (D. C., N. D. West Virginia, 1914), per Woods, Circuit Judge, at pp. 943-944; *Detroit and Mackinac Ry. Co. vs. Michigan R. R. Commission*, 235 U. S., 402 (1914), per Mr. Justice Holmes, at pp. 404-406. It is recognized in all the cases in the State Supreme Court. See the opinion of that court in this case (R., Vol. I, pp. 111 *et seq.*); also *Borough of Mt. Union vs. Mt. Union Water Co.; St. Clair Borough vs. Tamaqua & Pottsville Elec. Ry. Co.; Klein-Logan Co. vs. Duquesne Light Co., ubi supra.*

To sum up: We have here a case where the Public Service Commission fixed the entire schedule of rates and determined the entire annual revenue of a water company. The Superior Court, the only State court open to the company in the first instance, set aside the order of the Commission on the ground that it was based upon a valuation must less than the true value of the Company's property. The Supreme Court reversed the decree of the Superior Court and reinstated the order of the Commission. It did so, not on the ground that the findings of fact made by the Superior

Court were incorrect, but on the theory that that court could "not examine the facts further than to determine whether there was substantial evidence to sustain the order" of the Commission (see opinion of Supreme Court, R., vol I, p. 114).

We will show in an appendix to this portion of our argument (pp. 170-209) that no other court of last resort has so held in a case involving the entire revenue of a public service company; and we respectfully submit that the effect of the Public Service Company Act, as construed in this case, was to deprive the plaintiff in error of its liberty and property without due process of law by denying it a proper hearing upon the question of confiscation. This is a necessary conclusion from the following propositions which we will discuss in order:

(a) That the order of the Public Service Commission fixing the rates and the entire revenue of the plaintiff in error was a legislative act.

(b) That the constitutional question whether this legislative act was confiscatory was ultimately a question for a court, not the legislative body, to decide.

(c) That the legislature cannot require the court, in passing on the constitutionality of a legislative act, to sustain it when there is any substantial evidence to support it, though the weight of the evidence may be clearly against its validity.

(d) That the possibility of relief in the Federal courts does not enable the legislature so to confine the State courts in their inquiry into

the legality of legislative action under the Federal Constitution.

If these propositions be correct, we respectfully submit that the decree of the Supreme Court of Pennsylvania must be reversed.

(A) THE ORDER OF THE PUBLIC SERVICE COMMISSION IN THIS CASE WAS A LEGISLATIVE ACT.

It is not necessary to labor this proposition. The distinction between the three classes of governmental functions is embedded in the fundamental jurisprudence of Pennsylvania as firmly as in the Federal Constitution. We do not mean to contend that the legislature of the State could not unite functions of two or all of the three classes in the Public Service Commission. Granting that it may do so and that it has done so, the fact remains that the function exercised by the Commission in fixing the rates of the plaintiff in error was purely and simply legislative. Its action was in no sense judicial. It enforced no cause of action. It passed upon no pre-existing rights. It did not declare the law governing past transactions between the water company and its customers; it prescribed a law for the government of future transactions between them. The taking of testimony by the dissenting commissioner and the argument upon it before him and two of the other commissioners were proceedings of the same character as those frequently held by legislative committees. In fixing the rates the Commission was the delegate of the

General Assembly of Pennsylvania, but it was nothing more. When its order was made, it had perhaps the effect of an Act of Assembly, but certainly no greater effect. Grant that the legislature armed the Commission with great powers of rate-making, its exercise of those powers, just as a similar exercise by the legislature, must be vulnerable at the Achilles' heel of unconstitutionality

This proposition is too plain for argument, but it is important in itself and it is at the very base of our contention. The authorities which support it, moreover, throw greater light upon this case than we can by our argument. We shall not apologize, therefore, for citing them at length.*

"Any enactment," said Mr. Justice Field, delivering the opinion of the court in *Williams vs. Bruffy,* 96 U. S., 176 (1877), at p. 183, "from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws."

In *Interstate Commerce Commission vs. Cincinnati, etc., Ry. Co.,* 167 U. S., 479 (1897), the court said by Mr. Justice Brewer (pp. 499-500, 505):

"It is one thing to inquire whether the rates

*Citations of cases bearing upon this subdivision of our argument follow from this point to p. 84.

which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. *Chicago, Milwaukee &c. Railway vs. Minnesota,* 134 U. S., 418, 458; *Reagan vs. Farmers' Loan & Trust Co.,* 154 U. S., 362, 397; *St. Louis & San Francisco Railway vs. Gill,* 156 U. S., 649, 663; *Cincinnati, New Orleans &c. Railway vs. Interstate Commerce Commission,* 162 U. S., 184, 196; *Texas & Pacific Railway vs. Interstate Commerce Commission,* 162 U. S., 197, 216; *Munn vs. Illinois,* 94 U. S., 113, 144; *Peik vs. Chicago & Northwestern Railway,* 94 U. S., 164, 178; *Express cases,* 117 U. S., 1, 29. * * *

"The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance."

In *Steenerson vs. Great Northern Ry. Co.,* 69 Minnesota, 353 (1897), the court said by Canty, J. (p. 375):

"The fixing of rates is a legislative or administrative act, not a judicial one. *State vs. Chicago,* 38 Minn., 281, 298, 37 N. W. 782."

In *Western Union Tel. Co. vs. Myatt,* 98 Fed. Rep.,

335 (C. C., Kansas, 1899), the court (Hook, District Judge) said (pp. 345-346):

> "It was argued at the bar on behalf of the defendants that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9 of section 8 of the act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act. To use the lan-

guage of the supreme court of Kansas in *The Auditor vs. Railroad Co.*, 6 Kan., 509:

'It certainly could not be so in the sense in which our constitution uses the term, or it would, of necessity, obliterate the line by which the framers of that instrument sought to keep separate and distinct the three branches of our government.'

"As was said in *Re Huron*, 58 Kan., 156, 48 Pac., 576, 36 L. R. A., 824:

'Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer.'

"Counsel say:

'The decision of a question which may arise between different railroad companies as to how much of a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive.'

"That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the court of visitation. The intent of the act of the legislature was, not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the state and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?"

In *San Diego Land and Town Co. vs. Jasper,* 189 U. S., 439 (1903), the court said by Mr. Justice Holmes (pp. 440-441):

> "We need not stop to consider to what extent or for what purposes the proceedings before the supervisors properly may be termed judicial. See further *San Diego Land & Town Co. vs. National City,* 174 U. S., 739, 750; *Cambridge vs. Railroad Commissioners,* 153 Mass., 161, 170. It is obvious that they are not so in such a sense as to do the appellant any good. The petitioners did not complain of injury to any private interest of theirs. They had none. They appeared on behalf of the public only and asked purely legislative action in the form of a general rule for the future to govern the public at large. *San Diego Land & Town Co. vs. National City, ubi supra; Spring Valley Water Works vs. San Francisco,* 82 Cal., 286; *Smith vs. Strother,* 68 Cal., 194; *Janvrin, Petitioner,* 174 Mass., 514."

Prentis vs. Atlantic Coast Line Co., 211 U. S., 210 (1908), is the leading case upon this branch of our argument, and disposes of any possibility of dispute as to the nature of the action taken by the Public Service Commission in the case at bar. Mr. Justice Holmes, delivering the opinion of the court, said (pp. 226-228):

> "But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial in-

quiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial in kind, as seems to be fully recognized by the Supreme Court of Appeals, *Commonwealth vs. Atlantic Coast Line Ry. Co.*, 106 Va., 61, 64, and especially by its learned President in his pointed remarks in *Winchester and Strasburg R. R. Co. and others vs. The Commonwealth*, 106 Va., 264, 281. See further *Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S., 479, 499, 500, 505; *San Diego Land & Town Co. vs. The Jasper*, 189 U. S., 439, 440.

"Proceedings legislative in nature are not proceedings in court within the meaning of Rev. Stats., Sec. 720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co. vs. Greensboro Ice & Coal Co.*, 134 Fed. Rep., 82, 94, affirmed *sub nom. McNeill vs. Southern Ry. Co.*, 202 U. S., 543. That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia*, 100 U. S., 339, 348. They are not a suit in which a writ of error would lie under Rev. Stats., Sec. 709, and Act of February 18, 1875, c. 80, 18 Stat., 318. See *Upshur County vs. Rich*, 135 U. S., 467; *Wallace vs. Adams*, 204 U. S., 415,

423. The decision upon them cannot be *res judicata* when a suit is brought. See *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In *Pickering vs. Barkley*, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States.

And all that we have said would be equally true if an appeal had been taken to the Supreme Court of Appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the Supreme Court of Appeals itself. *Atlantic Coast Line Ry. Co. vs. The Commonwealth,* 102 Va., 599, 621. They are implied in many cases in this and other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call litigation in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is passed. See *Southern Ry. Co. vs. The Commonwealth,* 107 Va., 771, 772."

In *Home Tel. and Tel. Co. vs. City of Los Angeles,* 211 U. S., 265 (1908), the court said by Mr. Justice Moody (p. 278):

"The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and even where exercised by a subordinate body upon

which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner vs. Denver*, 210 U. S., 373) would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by Sec. 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that if charges were fixed in that manner the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. *San Diego Water Co. vs. San Diego*, 118 California, 556. Acting within the authority thus limited it would seem the character and extent of the investigation made and notice and hearing afforded in the exercise of this legislative function, would be left to the discretion of the body exercising it."

In *Honolulu Rapid Transit & Land Co. vs. Territory of Hawaii*, 211 U. S., 282 (1908), the court said by Mr. Justice Moody (pp. 290-291):

"The business conducted by the Transit Company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. *Reagan vs.*

Farmers' Loan & Trust Co., 154 U. S., 362, 393, 394; *Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S., 479, 494. We need not consider whether that legislative power may be conferred upon the courts of the Territory, as it may be upon the courts of a State, so far as the Federal Constitution is concerned. *Prentis vs. Atlantic Coal Line Co., ante*, p. 210. In this case the legislative power of regulation was not entrusted to the courts."

In *City of Knoxville vs. Knoxville Water Co.*, 212 U. S., 1 (1909), the court said by Mr. Justice Moody (p. 8):

"The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an action of the legislature that is attacked but an ordinance of a municipality. Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentis vs. Southern Railway Co.*, 211 U. S., 210; *Honolulu Transit Co. vs. Hawaii*, 211 U. S., 282."

In *Oregon R. & Navigation Co. vs. Campbell*, 173 Fed. Rep., 957 (C. C., Oregon, 1909), the court (Wolverton, District Judge) said (p. 975):

"Now, it is urged that the act of the commis-

sion, determining what rates are reasonable and fixing them for the future regulation of the railroad company, is a judicial act. Not so within the intendment of the law. It is first prescribed that all rates shall be reasonable. The railroad is subject to this injunction, as well as the commission. When it transpires that the railroad company is not observing the law, then the commission is charged with the duty of fixing a rate for the company. This, the authorities say, is a legislative function; but it may be done through the instrumentality of a railroad commission. The order of the commission being *prima facie* lawful, and the rates fixed *prima facie* reasonable, it is provided that it shall become operative in due course, unless the company is dissatisfied with the rates fixed by the commission. If so dissatisfied, the company is given a remedy for having judicially determined the reasonableness of such rates. There is language defining the duty of the commission in this relation, and delineating its procedure, that impresses one at first blush that it was designed that the commission should act judicially in determining this. But the fact that it is not made the final arbiter, that its order is only *prima facie* lawful, and the rates thereby fixed only *prima facie* reasonable, and that a court of constitutional judicatory is made the final forum in which to determine the reasonableness of such rates, demonstrates the true intendment of the commission act."

In *Grand Trunk Western Ry. Co. vs. R. R. Commission of Indiana*, 221 U. S., 400 (1911), Mr. Justice

Van Devanter, delivering the opinion of the court, observed of the order of the commission which was attacked (p. 403)

"that the order is a legislative act by an instrumentality of the State exercising delegated authority (*Prentis vs. Atlantic Coast Line Co.*, 211 U. S., 210), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution (*New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S., 18, 31; *St. Paul Gas Light Co. vs. St. Paul*, 181 U. S., 142, 148; *Northern Pacific Ry. Co. vs. Duluth*, 208 U. S., 583, 590)."

In the *Minnesota Rate Cases*, 230 U. S., 352 (1913), the court said by Mr. Justice Hughes (p. 433):

"The rate making power is a legislative power and necessarily implies a range of legislative discretion."

In *Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pennsylvania, 114 (1914), the court said by Elkin, J. (p. 118):

"The disposition everywhere is to commit questions relating to the regulation, and to the rates of public service corporations, to the supervisory powers of special tribunals, and concededly matters of this character are within the domain of legislative action."

In *Lusk vs. Atkinson*, 268 Missouri, 109 (1916), the court said by Bond, J. (pp. 116-117):

"The Public Service Commission was created *eo nomine* by the Legislature of 1913. The design

of the act was to create an administrative agency of the lawmaking power. The board of commissioners thus established were not intended to be vested with the essential functions and powers of a court of law and equity, for under the express provisions of the Constitution of Missouri, the Legislature could establish courts only in the classes of cases, and in the manner and to the extent provided by that instrument, and the board does not fall under the head of any of the courts described in the Constitution. (Constitution of Missouri, art. 6, secs. 1, 28, 31; *State ex rel. vs. Nast,* 209 Mo., 708; *State ex rel. vs. Fort,* 210 Mo., 512; *State ex rel. Haughey vs. Ryan,* 182 Mo., 1, c. 355; *State ex rel. vs. Woodson,* 161 Mo., 1, c. 453).

"Since the Legislature has no power to create a court not falling within the classes specified in the Constitution, not in any other manner than therein empowered so to do, it follows that the Public Service Commission is only a representative agency established by the legislature, whose powers and duties are specifically set forth, none of which include the prerogatives of a court; for neither the Legislature nor any of its delegated agencies could exercise these under our Constitution, and if the act had been passed for that purpose, it would be void. The findings and orders, which the Public Service Commission is empowered to make, though bearing some resemblance to some of the judicial actions of a court of law and equity, are yet merely incidents of the work of investigation and determinations of facts and questions devolved upon that body by the Legislature,

and do not imply on its part the possession of any of the essential attributes or machinery of constitutional courts in this State."

In *Arkadelphia Milling Co. vs. St. Louis Southwestern Ry. Co.*, 249 U. S., 134 (1919), at the last term, the court reiterated the principle under a new state of facts, saying by Mr. Justice Pitney (pp. 140-141):

"The appeals from the final decrees in the main causes were brought direct to this court, because of the constitutional question, under Sec. 5 of the Circuit Court of Appeals of March 3, 1891, c. 517, 26 Stat. 827, which provided for such an appeal in the following cases, among others: 'In any case that involves the construction or application of the Constitution of the United States * * * In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' This section, of course, was the predecessor of Sec. 238, Judicial Code, under which the present appeals were taken. And it is plain that the orders of the railroad commission were state laws within the meaning of this provision. *Williams vs. Bruffy*, 96 U. S., 176, 183; *Atlantic Coast Line R. R. Co. vs. Goldsboro*, 232 U. S., 548, 555."

In the latest case which we have found in a state appellate court, *State vs. Public Service Commission*, 210 Southwestern Rep., 386 (Missouri, 1919), the court said by Walker, P. J. (p. 391):

"The technical exactness of court pleadings is not required in complaints filed before the commis-

sion; it is not a court, but as we said in *Atch., etc., Ry. Co. vs. Pub. Serv. Com.*, 192 S. W., 460, 'a committee created by the Legislature to make findings of fact and orders based' thereon, 'which, if reasonable, * * * may be enforced by the * * * courts'."

And in the last case in this court, *Lake Erie & Western R. R. Co. vs. State Public Utilities Commission of Illinois*, 249 U. S., 422 (1919), the result of the authorities upon the nature of orders of such commissions is thus summed up by the court, speaking by Mr. Justice Van Devanter (p. 424):

"Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. *Grand Trunk Western Ry. Co. vs. Railroad Commission of Indiana*, 221 U. S., 400; *Ross vs. Oregon*, 227 U. S., 150, 162-163; *Home Telephone & Telegraph Co. vs. Los Angeles*, 227 U. S., 278-296; *Atlantic Coast Line R. R. Co. vs. Goldsboro*, 232 U. S., 548, 555; *Wadley Southern Ry. Co. vs. Georgia*, 235 U. S., 651, 660-661; *Arkadelphia Milling Co. vs. St. Louis Southwestern Ry. Co.*, 249 U. S., 134."

See also *Chicago & N. W. Ry. Co. vs. Dey*, 35 Fed. Rep., 866 (C. C., S. D. Iowa, 1888), per Brewer, Circuit Judge, at p. 874; *Chicago, etc., Ry. Co. vs. Minneso'a*, 134 U. S., 418 (1890), per Mr. Justice Miller at p. 459; *Reagan vs. Farmers' Loan and Trust Co.*, 154 U. S., 362 (1894), per Mr. Justice Brewer at p.

397; *Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission,* 206 U. S., 1 (1907), per Mr. Justice White at p. 19; *Trustees of the Village of Saratoga Springs vs. Saratoga Gas, etc., Co.,* 191 New York, 123 (1908), per Cullen, Ch. J., at pp. 133, 134, 140-145; *Railroad Commission of Alabama vs. Central of Georgia Ry. Co.,* 170 Fed Rep., 225 (C. C. A., Fifth Circuit, 1909), per Shelby, Circuit Judge, at p. 238; *Love vs. Atchison, T. & S. F. Ry. Co.,* 185 Fed. Rep., 321 (C. C. A., Eighth Circuit, 1911), per Sanborn, Circuit Judge, at p. 327; *Wilmington City Ry. Co. vs. Taylor,* 198 Fed. Rep., 159 (D. C., Delaware, 1912), per Bradford, District Judge, at pp. 186-187; *Ross vs. State of Oregon,* 227 U. S., 150 (1913), per Mr. Justice Van Devanter, at pp. 162-163; *Seward vs. Denver & Rio Grande R. R. Co.,* 17 New Mexico, 557 (1913), per Roberts, C. J., at p. 572; *Public Service Gas Co. vs. Board of Public Utility Commissioners,* 84 New Jersey Law, 463 (1913), per Swayze, J., at pp. 467, 468, affirmed in *Id. vs. Id.,* 87 New Jersey Law, 581 (1914), and writ of error dismissed with costs, per stipulation, 242 U. S., 666 (1917); *State vs. Great Northern Ry. Co.,* 123 Minnesota, 463 (1913), per Taylor, C., at p. 467; *Louisville and Nashville R. R. Co. vs. Garrett,* 231 U. S., 298 (1913), per Mr. Justice Hughes at pp. 313-314; *Bacon vs. Rutland R. R. Co.,* 232 U. S., 134 (1914), per Mr. Justice Holmes at pp. 137-138; *Manufacturers' Light & Heat Co. vs. Ott,* 215 Fed. Rep., 940 (D. C., N. D. West Virginia, 1914), per Woods, Circuit Judge, at 943-944; *Wadley Southern Ry. Co. vs. Georgia,* 235 U. S., 651 (1915), per Mr. Justice Lamar at pp. 660-661; *Northern Pacific Ry. Co. vs. State of North Dakota,* 236 U. S., 585 (1915), per Mr. Justice

Hughes at pp. 599, 604; *State vs. Great Northern Ry. Co.*, 130 Minnesota, 57 (1915), per Hallam, J., at p. 60; *Public Service Commission vs. Cleveland, C., C. & St. L. Ry. Co.*, 121 Northeastern Rep., 116 (Indiana, 1918), per Lairy, J., at p. 118.

We submit, therefore, that the order of the Public Service Commission in this case was purely and simply a legislative act. It remains to consider whether the plaintiff in error has been denied a proper investigation as to the constitutionality of that act.

(B) THE QUESTION AS TO CONFISCATION OF THE PROPERTY OF THE PLAINTIFF IN ERROR, UNDER THE FOURTEENTH AMENDMENT, IS A JUDICIAL QUESTION AND COULD NOT BE FINALLY DETERMINED IN THIS CASE BY THE PUBLIC SERVICE COMMISSION.

The action of the Public Service Commission was, of course, subject to the question whether it deprived the plaintiff in error of its liberty or property without due process of law. The Commission was bound to consider this question, but could not conclude the Water Company by its decision. No one may be judge in his own cause. It was the Commission's duty to fix the rates. In performance of this duty it made a finding as to the value of all the property of the company, determined the entire net annual revenue which it should be permitted to earn, and established a complete schedule of rates on that basis. When it did this, its order, like a statute to the same effect, since it was

claimed by a party affected by it to be in conflict with the Federal Constitution, had to be passed upon by an independent tribunal. Confiscation *vel non* under the Fourteenth Amendment is a judicial question, and all the authorities hold that it can be concluded only after a judicial hearing and by the judgment of a court, not by the mere *fiat* of a legislative commission.*

After a review of the earlier cases, Mr. Justice Brewer, then Circuit Judge, said in *Chicago & N. W. Ry. Co. vs. Dey*, 35 Fed. Rep., 866 (C. C., S. D. Iowa, 1888), at 878:

> "It is obvious from these last quotations that the mere fact that the legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts; and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings which in the end, if not restrained, will work a confiscation of the property of complainant."

In the leading case of *Chicago, etc., Ry. Co. vs. Minnesota*, 134 U. S., 418 (1890), the court said by Mr. Justice Blatchford (pp. 456-457, 458):

> "The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and pub-

*Citations of cases bearing upon this subdivision of our argument follow from this point to p. 114.

lished by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful; and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state

court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * *

"In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Mr. Justice Miller, in a concurring opinion, said (pp. 459-460):

"1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

"2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.

"3. Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law."

In the keen analysis of this great judge's opinion, to which we shall refer again hereafter, is to be found, we submit, a complete and firm basis for deciding the case at bar.

In *Reagan vs. Farmers' Loan and Trust Co.*, 154 U. S., 362 (1894), the court said by Mr. Justice Brewer (pp. 397, 399):

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the

transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by the legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. * * *

"These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of

property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public, as a whole), operates to divest the other party of any rights of person or property."

In *St. Louis and San Francisco Ry. Co. vs. Gill*, 156 U. S. 649 (1895), the court said by Mr. Justice Shiras (pp. 657-658):

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S., 307, 331; *Dow vs. Beidelman*, 125 U. S., 681; *Chicago, Milwaukee, &c., Railway vs. Minnesota*, 134 U. S., 418; *Chicago & Grand Trunk Railway vs. Wellman*, 143 U. S., 339; *Reagan vs. Farmers' Loan and Trust Co.*, 154 U. S., 362."

In *Smyth vs. Ames,* 169 U. S., 466 (1898), the court said by Mr. Justice Harlan (pp. 526-527):

"In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment or regulation made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

"The cases before us directly present the important question last stated.

"Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to 'reasonable' maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it can not be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights."

In *Western Union Tel. Co. vs. Myatt*, 98 Fed. Rep., 335 (C. C., Kansas, 1899), is perhaps the most elaborate treatment of the subject to be found in the books. In the course of its learned opinion, the court (Hook, District Judge) said (pp. 341-342, 344, 354-355, 359-360):

"The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for service rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions,

boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for service to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

As applied to this case, the power of the State to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts. Whatever deprives an owner of the beneficial use of property lawfully acquired and held, or denies him a reasonable compensation for such use, in effect deprives him of the property itself, for, generally speaking, the chief value of property lies in the use and employment thereof; and to require of an owner or class of owners the use of their property for public benefit without reasonable compensation, while others are not subjected to such restrictions, is a denial of that equal protection of the laws which is one of the safeguards of the constitution. Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. *Reagan vs. Trust Co.*, 154 U. S., 362, 14 Sup. Ct. 1047, 38 L. Ed. 819; *Smyth vs. Ames*, 169 U. S., 466, 18 Sup. Ct., 418, 42 L. Ed., 819. It follows, therefore, as a corollary of this doctrine, that courts have

no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi* public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different. * * *

"The foregoing will serve to illustrate sufficiently the line of demarkation between legislative and judicial functions as respects the subject-matter under consideration. The power to regulate and to limit the charges of those engaged in occupations clothed with a public interest belongs to the state, and is exercised through the legislature, either directly or mediately; but that power is not a power to destroy. Its authority stops at injustice, and under the right to prescribe rates of service it cannot require a corporation or individual engaged in a legitimate enterprise to yield to the alternative of abandoning the occupation, and the lawful employment of property therein, or continuing the same without reasonable and just compensation; and, where this is threatened, the jurisdiction of the courts may be invoked. * * *

"In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the fourteenth amendment to the constitution? Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts cannot legislate and pass judgment thereon. Legislative bodies, or boards, that are constituted as legislative agencies, cannot render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law. In the Sims Case, *supra*, Johnson, J., said, with reference to the conferring of power upon a county attorney to punish a witness for contempt in a proceeding before him under the prohibitory liquor law, that it was not within the power of the legislature to make a judge an arbiter in his own cause, and that to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurisprudence. In that case a county attorney

was recognized as being the representative of the state. In the case under consideration it seems clear, not that the members of the court of visitation are representative executive officers of the state, but that they are the direct and active representatives of the legislative department. It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance as it would be to confer judicial powers upon an executive officer. Judge Cooley says:

> 'If the legislature is intrusted with apportioning and providing for the exercise of judicial power, we cannot understand them to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but it is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.' Const. Lim. 413.

"That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty, or property of a person, is a startling proposition,

and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings. Chief Justice Shaw said, in *Com. vs. Essex Co.*, 13 Gray, 239, 253, 'Extreme cases are allowable to test a legal principle.' Suppose the legislature should repeal the crimes and punishment act of the state of Kansas, and, the state constitution not inhibiting, should delegate to some board or body, or, for that matter, to a single person, the power to formulate new laws, to construe and apply the same as a court, and to execute their judgments, would this be due process of law, under the federal constitution? I think not, and for the reason that it would be repugnant to the underlying, vital principles of our government, state and national. It would not be justice as it is understood of men. The results would comprise legislative judgments and judicial legislation. The protection of the fourteenth amendment to the constitution is not confined to life and liberty, but extends to and includes as well the property of a person. A corporation is held to be a person within the meaning of its provisions. I am therefore of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or a telegraph company, would not be due process of law within the meaning of the federal constitution. * * *

"Judicial powers may be conferred without designating the recipient a court. Legislative

powers may be delegated and administrative powers conferred, and the recipient may be denominated a court. In neither case does the terminology employed govern, but courts look behind the form and appearance, and determine the character of the board or tribunal by the sustance of its jurisdiction and powers. That the act establishing the court of visitation is either wholly void, or void to the extent that it attempts to confer judicial powers upon that body, I have no doubt. It is unnecessary to determine, in this case, whether the court of visitation, though possessing no judicial functions, may still have and exercise the legislative and administrative powers specified in the acts of the legislature.

"The conclusions arrived at are substantially as follows:

1. That the proofs adduced in this cause show *prima facie* that the maximum rates for telegraph service prescribed by chapter 38 of the laws enacted by the legislature of the state of Kansas at the special session of 1898 are less than the cost of performing the service, and are, therefore, unreasonable, and confiscatory; and that the enforcement of such rates, which is threatened, would operate to deprive the telegraph company of its property without due process of law, and would be a denial of the equal protection of the laws.

2. That in the enactment of the law creating the court of visitation of the state of Kansas and defining its powers and jurisdiction, and of the subsequent law extending such powers and jurisdiction to telegraph companies, the legislature

attempted to confer full power to regulate the important and substantial legislative, administrative and judicial powers, to be exercised in the same proceeding, and as to the same subject-matter. It attempted to confer full power to regulate the operation of railroad and telegraph companies and to prescribe schedules of rates and charges, which power is legislative or administrative in its character. It also attempted to confer upon the court of visitation the power to pass judicially upon its regulations, and the reasonableness of the rates fixed by it, to embody its determination in decrees, which it was authorized to enforce by the appointment of receivers and the sequestration of the property of the companies.

3. The distinction between legislative and judicial functions is a vital one, and it is not subject to change or impairment either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some subordinate board or agency, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

4. That the law creating the court of visitation is in contravention of the constitution of the state of Kansas, which inhibits the conferring of

inconsistent legislative and judicial powers upon the same body, to be exercised regarding the same subject-matter.

5. That a proceeding in the court of visitation to determine judicially the validity and reasonableness of a body of rates established by it in the exercise of its legislative functions is not due process of law, within the meaning of the fourteenth amendment to the federal constitution. An active, potential agency of the legislative power of a state cannot be empowered to sit in judgment upon the validity of its own enactments, and to enforce its decrees with reference thereto by the exercise of the extraordinary powers of a court of chancery."

In *Chicago, etc., Ry. Co. vs. Tompkins,* 176 U. S., 167 (1900), the court said by Mr. Justice Brewer (pp. 172-173):

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in *Yick Wo vs. Hopkins,* 118 U. S., 356, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the

play and action of purely personal and arbitrary power.'

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. *Railroad Commission Cases*, 116 U. S., 307; *Dow vs. Beidleman*, 125 U. S., 680; *Georgia Railroad & Banking Co. vs. Smith*, 128 U. S., 174; *Chicago, Milwaukee & St. Paul Railway vs. Minnesota*, 134 U. S., 418; *Chicago & Grand Trunk Railway vs. Wellman*, 143 U. S., 339; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362; *St. Louis & San Francisco Railway vs. Gill*, 156 U. S., 649; *Covington, &c., Turnpike Co. vs. Sanford*, 164 U. S., 578; *Smyth vs. Ames*, 169 U. S., 466.

"It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts

may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene. A single illustration will make this clear: It is within the competency of the legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if after determining that certain property shall be taken for public uses the legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislative enactment in respect to rates."

In *Ex parte Young*, 209 U. S., 123 (1908), the court said by Mr. Justice Peckham (p. 144):

"The sufficiency of rates with reference to the Federal Constitution is a judicial question, and one over which Federal courts have jurisdiction by reason of its Federal nature. *Chicago &c. R. R. Co. vs. Minnesota*, 134 U. S., 418; *Reagan vs. Farmers, &c. Co.*, 154 U. S., 369, 399; *St. Louis &c. vs. Gill*, 156 U. S., 649; *Covington &c. Turnpike Road Company vs. Sandford*, 164 U. S., 578; *Smyth vs. Ames*, 169 U. S., 466, 522; *Chicago &c. Railway Co. vs. Tompkins*, 176 U. S., 167, 172."

In *Home Tel. and Tel. Co. vs. City of Los Angeles*,

211 U. S., 265 (1908), the court said by Mr. Justice Moody (p. 278):

"It must not be forgotten that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists."

In *Oregon R. & Navigation Co. vs. Campbell*, 173 Fed. Rep., 957 (C. C., Oregon, 1909), the court (Wolverton, District Judge) said (pp. 966, 975):

"The allegations of the bill to the effect that the railroad commission act of Oregon and the order of the commission, made in pursuance thereof, fixing the rates complained of, are an invasion of the exclusive right of Congress to regulate interstate commerce, that the rates so fixed and established are unreasonable and unjust, and that complainant is practically inhibited from having the question as to whether they are in fact unreasonable and unjust adjudicated by a tribunal of justice by reason of the supposed drastic penalties imposed for an attempt to obtain such an adjudication, beyond dispute present federal questions for decision, and this court has jurisdiction of the controversy. This would be true, whether complainant's position were maintainable or not in fact; for that is not to the purpose. The federal questions remain, and afford basis for interposition by the federal courts. It is unnecessary to cite authorities in support of this position. * * *

"The Legislature can fix rates upon traffic, but in their establishment they must be reasonable. If unreasonable, the courts will declare them so. In fixing such rates, an investigation must necessarily precede the legislative action; but the law declares that the Legislature may fix rates through a functionary called a commission, and, when the commission acts, it is as if the Legislature had fixed the rates. But, like the rates established by the Legislature, if unreasonable, such rates are not binding upon the transportation companies affected. Recognizing this condition, the act in question has provided a remedy whereby the rates fixed may be judicially determined as it respects their reasonableness. The act of the commission being valid prima facie, the rates fixed become a law unto the carrier until a competent court declares them to be unreasonable. Just so with an act of the Legislature fixing rates, because no law fixing unreasonable rates can bind the carrier."

In *Love vs. Atchison, T. & S. F. Ry. Co.*, 185 Fed. Rep., 321 (C. C. A., Eighth Circuit, 1911), the court said by Sanborn, Circuit Judge (p. 327):

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final, have been put and are maintained in actual operation under penalty of heavy fines, the question whether or not their effect is to take the property of the railroad companies affected thereby without just compensation is a judicial one, conditioned by past or present facts, and the national courts

cannot be deprived of jurisdiction of it by the fact that the process of making tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the ratemaking process by provisions of a state Constitution, or of a state law, or by orders of a state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed."

In *Sabre vs. Rutland R. R. Co.*, 86 Vermont, 347 (1913), the court said by Haselton, J. (p. 366):

"But where a board, as the Board of Health, or the Board of Railroad Commissioners, has conferred upon it the power to make rules and regulations in furtherance of the police power, the statute is interpreted as though it conferred only the power to make reasonable regulations, and so the legislative act becomes complete, and the question of whether the rules and regulations presented are reasonable, or are unreasonable and arbitrary, is

a strictly judicial one of which the courts must take cognizance whether the statute provides for proceedings in that regard or not. *State vs. Speyer*, 67 Vt. 502; *In re Trustees vs. Saratoga, etc. Co.*, 191 N. Y. 23; *State vs. Haskell*, 84 Vt. 423, 431; *Brownell vs. Russell*, 76 Vt. 326; *State vs. Audette*, 81 Vt. 430; *Bacon vs. Boston & Maine*, 83 Vt. 421; *State vs. Central Vermont Ry. Co.*, 81 Vt. 459; *Boote, etc. Co. vs. Baker*, 196 U. S., 119, 126; *Cosmas Co. vs. Grey Eagle Co.*, 190 U. S., 309; *Grand Trunk Ry. Co. vs. Railroad Comm. of Md.*, 221 U. S., 400, 403."

In *Seward vs. Denver & Rio Grande R. R. Co.*, 17 New Mexico, 557 (1913), the court said by Roberts, C. J. (p. 572):

"While the fixing of the rates, or the determination of the facilities to be afforded, in the first instance, is a legislative question, the determination of the reasonableness and lawfulness of the rate or other requirement, is a judicial function."

In *Louisville and Nashville R. R. Co. vs. Garrett*, 231 U. S., 298 (1913), the court sustained a state statute giving a railroad commission authority to fix reasonable rates, which failed to provide for an appeal from orders of the commission to the courts. The court said by Mr. Justice Hughes (pp. 310-311, 312-314):

"The order is further attacked upon the ground that the statute under which it was made operates to deprive the carrier of its property without due process of law and to deny to it the equal protec-

tion of the laws contrary to the Fourteenth Amendment.

"It is insisted that the failure to provide for an appeal to any court from the final order of the Commission, or for a judicial review of the reasonableness of the prescribed rates before they become effective, makes the statute void. *But the statute does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry.* We have not been referred to any decision of the state court holding that the statute should be so construed (Chicago &c. Railway Co. vs. Minnesota, 134 U. S., 418, 456). *If the Commission establishes rates that are so unreasonably low as to be confiscatory, an appropriate mode of obtaining relief is by bill in equity to restrain the enforcement of the order.* Chicago &c. Railway Co. vs. Minnesota, 134 U. S., 418, 459, 460; St. Louis & San Francisco Ry. Co. vs. Gill, 156 U. S., 649, 659, 666; Ex parte Young, 209 U. S., 123, 166. *Presumably, the courts of the State, as well as the Federal courts, would be open to the carrier for this purpose* (Home Telephone Co. vs. Los Angeles, 211 U. S., 265, 278) *without express statutory provision to that effect.* In answer to the present objection, it is sufficient to say that there is no showing here of an attempt to preclude such resort to the courts, or to deny to the carrier the assertion of its rights, unless it can be found in the severity of the penalties attached to disobedience of the order. And, if it were assumed that these would be open to objection as operating to deprive the

carrier of a fair opportunity to contest the validity of the Commission's action, still, the penal provisions would be separable, and the force of the remaining portion of the statute would not be impaired. * * *

"The right of the carrier to make its own intrastate rates is subject to the law of the State constitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the courts apply the common law. But it is the province of the legislature to make the law; but when the legislature, or the body acting under its authority, establishes the rate to be thereafter charged by the carrier, it is the duty of the courts to enforce the rule of law so made unless the constitutional limits of the rate-making power have been transgressed. The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power. It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted, and a determination by the Commission whether the existing rates were

excessive. But, on these conditions being fulfilled, the question of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the courts. The appropriate questions for the courts would be whether the Commission acted within the authority duly conferred by the legislature, *and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the Commission went beyond the domain of the State's legislative power and violated the constitutional rights of property by imposing confiscatory requirements.* Stone vs. Farmers' Loan & Trust Co., 116 U. S., 307, 331; Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362; 397-399; Smyth vs. Ames, 169 U. S., 466, 526; San Diego Land & Town Co. vs. National City, 174 U. S., 739, 754; San Diego Land & Town Co. vs. Jasper, 189 U. S., 439, 336; Knoxville vs. Knoxville Water Co., 212 U. S., 1, 8, 17; Willcox vs. Consolidated Gas Co., 212 U. S., 19, 41; The Minnesota Rate Cases, 230 U. S., 352, 433, 434." (Italics ours.)

It is obvious that the statute was sustained merely because it left unimpeded recourse to the courts upon the constitutional question of confiscation. The Pennsylvania statute, however, under the construction given to it by the learned court below, left that recourse open only to a court fettered by the requirement that it must sustain the Commission's order if there was any substantial evidence at the hearing before the Commission to support it. The only remedy in the Pennsylvania

courts is by appeal from the Commission to the Superior Court (*vide supra*, pp. 61-66). In Kentucky a public service company may bring a bill in equity to try *de novo* the question as to confiscation of its property by the Commission; in Pennsylvania the Superior Court has been denied the power to give a judicial consideration even to the testimony before the Commission.

In *Wadley Southern Ry. Co. vs. Georgia*, 235 U. S., 651 (1915), the court said by Mr. Justice Lamar (pp. 660-661):

> "This contention would have been well founded if this and other hearings of a like nature before the Commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. *Chicago, &c., Ry. vs. Minnesota*, 134 U. S., 418, 458. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the Company was sued for the penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. *Railroad Commission vs. Louis. & Nash. R. R.*, 140 Georgia, 817 (6 a), 836; *State of Georgia vs. Western & Atlantic R. R.*, 138 Georgia, 835; *Southern Ry. vs. Atlantic Land Co.*, 135 Georgia, 35, 50. Such orders were also subject to attack in the Federal courts on the ground that the party affected has been unconstitutionally deprived of property: *Louis. & Nash R. R.*

vs. Garrett, 231 U. S., 298, 313, and cases cited. And this right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing (as in the *Young* and *Consolidated Gas Cases*); or by administrative orders of a Commission made after a hearing (as in the *Garrett Case, supra*). For rates made by the General Assembly or administrative orders made by a Commission are both legislative in their nature (*Garrett Case, supra; Grand Trunk R. R. vs. Indiana Railroad Commission*, 221 U. S., 400, 403) and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. *Chicago &c. vs. Minnesota*, 134 U. S., 418, 458; *Chicago &c. Ry. vs. Tompkins*, 176 U. S., 167; 174; *Prentis Atlantic Coast Line*, 211 U. S., 210; *Missouri Pacific Ry. vs. Nebraska*, 217 U. S., 196, 207; *Oregon R. R. & Nav. Co. vs. Fairchild*, 224 U. S., 510; *San Joaquin Co. vs. Stanislaus County*, 233 U. S., 459; *Bacon vs. Rutland R. R.*, 232 U. S., 134; *Detroit &c. R. R. vs. Michigan R. R. Com.*, 235 U. S., 402."

In *State vs. Great Northern Ry. Co.*, 130 Minnesota, 57 (1915), the court said by Hallam, J. (p. 59):

"The statute in terms makes the reasonableness of the order of the commission a question for the court to determine on appeal. This is a valid statutory provision. The reasonableness of the order is properly a judicial question. Argument of that proposition was foreclosed by the decision of

the Federal Supreme Court more than a quarter of a century ago. In the first case decided by that court involving the powers of the Railroad and Warehouse Commission of this State, it was held that 'the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.' *Chicago M. & St. P. Ry. Co. vs. Minnesota,* 134 U. S., 418, 458, 10 Sup. Ct., 462, 467, 33 L. ed., 970."

See also *Burlington, etc., Ry. Co. vs. Dey,* 82 Iowa, 312 (1891), per Beck, C. J., at pp. 338-339; *Chicago & Grand Trunk Ry. Co. vs. Wellman,* 143 U. S., 339 (1892), per Mr. Justice Brewer, at p. 344; *Interstate Commerce Commission vs. Brimson,* 154 U. S., 447 (1894), per Mr. Justice Harlan, at p. 485; *Covington and Lexington Turnpike Road Co. vs. Sandford,* 164 U. S., 578 (1896), per Mr. Justice Harlan at p. 592; *San Diego Land and Town Co. vs. Brimson,* 174 U. S., 739 (1899), per Mr. Justice Harlan, at p. 754; *Atlantic Coast Line Ry. Co. vs. Commonwealth,* 102 Virginia, 599 (1904), per Buchanan, J., at pp. 620-621; *Baltimore & Ohio R. R. Co. vs. United States,* 215 U. S., 481 (1910), per Mr. Justice White, at p. 493; *Interstate Commerce Commission vs. Chicago, etc., Ry. Co.,* 218 U. S., 88 (1910), per Mr. Justice McKenna, at pp. 110, 111; *Procter & Gamble Co. vs. United States,* 225 U. S., 282 (1912), per Mr. Chief Justice White, at pp. 297, 298; *Louisville & Nashville R. R. Co. vs. Railroad Com-*

missioners, 63 Florida, 491, per Whitfield, C. J., at pp. 505-506; *Rowand vs. Little Vermilion Special Drainage District,* 254 Illinois, 543 (1912), per Vickers, J., at pp. 547-548; *State vs. Great Northern Ry. Co.,* 123 Minnesota, 463 (1913), per Taylor, C., at p. 467; *Bacon vs. Rutland R. R. Co.,* 232 U. S., 134 (1914), per Mr. Justice Holmes, at p. 137; *Plymouth Coal Co. vs. Pennsylvania,* 232 U. S., 531 (1914), per Mr. Justice Pitney, at pp. 545, 547; *Pacific Live Stock Co. vs. Lewis,* 217 Fed. Rep., 95 (D. C., Oregon, 1914), per Bean, District Judge, at p. 98, affirmed in *Id. vs. Id.,* 241 U. S., 440 (1916); *People vs. McCall,* 219 N. Y., 84 (1916), per Cuddeback, J., at p. 88, affirmed in *Id. vs. Id.,* 245 U. S., 345 (1917), per Mr. Justice Clarke, at pp. 348-350; *Detroit & Mackinac Ry. Co. vs. Fletcher Paper Co.,* 248 U. S., 30 (1918), per Mr. Justice Holmes, at pp. 31-32; *Public Service Commission vs. Cleveland, C., C. & St. L. Ry. Co.,* 121 Northeastern Rep., 116 (Indiana, 1919), per Lairy, J., at p. 118.

We submit, therefore, that no principle is better settled than this, that the question, whether an order of a Public Service Commission fixing, as in this case, all of the rates of a public service company is confiscatory, is under the Fourteenth Amendment necessarily a question for a court to decide and requires for its determination a judicial hearing. We will address ourselves therefore to the inquiry whether such a consideration of the question has been denied to the plaintiff in error.

(C) THE INTERPRETATION OF THE PUBLIC SERVICE COMPANY LAW BY THE PENNSYLVANIA SUPREME COURT, REQUIRING THE SUPERIOR COURT TO SUSTAIN THE ORDER OF THE COMMISSION IF THERE WAS ANY SUBSTANTIAL EVIDENCE TO SUPPORT IT, DEPRIVED THE WATER COMPANY OF ITS CONSTITUTIONAL RIGHT TO A JUDICIAL REVIEW OF THE COMMISSION'S ACTION.

We have seen that the decisions are unanimously to the effect that the order of the Commission fixing all the rates of the plaintiff in error could not constitutionally conclude it, but must be open to judicial question under the due process clause of the Constitution. The learned court below does not contradict this proposition in terms, but we submit that it does contradict it for all practical purposes.

The only court of the state to which recourse could be had in the first instance was the Superior Court, to which an "appeal" was duly taken in this case. That court considered the question of deprivation of property without due process of law on the merits, and directed the Commission to reform its valuation of the Company's property. But the Supreme Court, on appeal, held that this was a usurpation of legislative functions, and that the statute did not permit the court to "examine the facts further than to determine whether there was substantial evidence to sustain the order." The Supreme Court then examined the testimony, and being of the opinion that the evidence against the Water

Company before the Commission was sufficient, if believed, to sustain the Commission's order, gave no consideration whatever to the evidence on behalf of the Water Company (see its opinion, R., Vol. I, pp. 116-121), but reversed the order of the Superior Court and reinstated the order of the Commission. In other words, it treated the order of the Commission as if it had been a judgment entered on the verdict of a jury.

But this court has said that an order fixing rates cannot be so treated in a case involving a Federal constitutional question, that it is not a judgment, that it is a mere legislative act, and that legislation "cannot bolster itself up" by an attempt to bind the world by "litigation in advance" before the legislative body itself: *Prentis vs. Atlantic Coast Line Co.*, 211 U. S., 210, 228 (1908). One claiming to be aggrieved by the legislation must be given a judicial hearing of the question whether he has been deprived of his property without due process of law.

We will point out later what we believe to be the cause of the error which, we submit, the learned court committed. But before doing so we must meet this question: Did the hearing before the court, as confined by the Supreme Court's interpretation of the statute, meet the requirement of due process of law in this case; that is, was it a judicial hearing? To this, we confidently answer *No.*

It will be observed that the hearing before the Superior Court, while denominated an "appeal" in the statute, was the beginning of litigation of the question

of constitutionality of the order fixing the rates. The hearing before the Commission was not a litigation of the question; it came before the "moment of legislation" was past: *Prentis vs. Atlantic Coast Line Co., ubi supra.* The first judicial investigation was before the Superior Court. The Supreme Court, by its interpretation of the statute, confined the Superior Court to the procedure characteristic of an appeal from a judicial decision. But that procedure *presupposes* a judicial hearing; it does not *secure* one. It did not give one to the plaintiff in error in this case, and thereby a constitutional right was set at naught.

For what is the essence of a judicial hearing?

We shall not maintain that it is the same in every case. A chancellor may decide a cause judicially on depositions. He need not have the witnesses before him. He may decide the cause on evidence taken before a master and reported to the court. He need not supervise directly the taking of the testimony. We may concede the propriety of a similar practice here. The Commission has important legislative functions to perform. It should not be required to act in the dark or upon an *ex parte* statement. It should not be permitted to do so. It is *its* duty to *avoid* a violation of the Fourteenth Amendment, just as it is the duty of the *courts* to *prevent* one. Both need light, all the light that they can get, upon the question. It is proper, therefore, to require any interested person, duly notified and given an opportunity to be heard by the Commission, to present at one time all his evidence for the consideration alike of the Commission and the courts. The question in this case is not whether the courts can

prevent the Commission in its legislative capacity from fixing rates on the basis of the record so made up. The question is whether the legislature can prevent the courts in their judicial capacity from determining the constitutionality of such rates on the basis of that record.

We might go on and concede other points as to the process permitted by the Pennsylvania court in this case. But we shall not do so. They would all prove immaterial to the real issue. There is one point that we cannot and will not and need not concede. *"Audi alteram partem,"* says Chief Justice Shaw, "lies at the very foundation of all regulated and intelligent judicial inquiry:" *Shaw vs. Stone,* 1 Cushing, 228, 243 (1848). It is worthy of note that it is the first principle discussed in Broom's Legal Maxims under the title "The Mode of Administering Justice" (pp. 113 et seq.). This is a case where *"judicial inquiry"* is requisite to due process of law; but it cannot be disputed that the courts, under the Pennsylvania Supreme Court's construction of the statute, could not hear both sides. The Commission was, in accordance with the statute, a litigant before the Superior Court, entitled (and, we will admit, justly entitled) to a presumption in its favor. But that is all. It is one thing to say that the evidence in support of the Commission's order should sustain it unless outweighed by a preponderance of evidence on the other side. It is another and a very different thing to say that if there is any substantial evidence in support of the Commission's order it must be sustained. In a case involving all the rates of a public service company, it is, we submit, impossible

to follow the theory of the Pennsylvania Supreme Court. For such a case presents a grave constitutional question, which can be decided only by a court; and a court is an independent body, correlative with, not subordinate to, the legislature, bound by its very nature, as well as by the Constitution, to shut its eyes to nothing in the record which will assist in its inquiry and to *hear both sides*. The legislature cannot evade the questioning of the constitutionality of its acts by an independent tribunal by the bare device of delegating its functions to a subordinate body and making the latter's action conclusive if only it will hold a hearing at which there shall be some evidence to justify the action taken. But that is the effect of the decision of the Pennsylvania court in this case.

A reversal of the decree is, therefore, we submit, clearly called for under the authorities which hold that the constitutionality of a rate-fixing order is a judicial question. The precise proposition stated at the head of this portion of our argument (p. 115), however, has not been passed upon by this court. The question is an important one. We shall, therefore, at the risk of some repetition, point out the inconsistency between the holding of the Pennsylvania Supreme Court and the adjudications of this court and other appellate tribunals. We shall discuss the cases in chronological order, and shall, with the Court's permission, indicate by italics portions of the opinions which appear to us particularly illuminating upon the question here involved.*

*Citations of cases bearing upon this subdivision of our argument, with comments thereon, follow from this point to p. 151.

In *Bronson vs. Kinzie*, 1 How., 310 (1843), the court said by Mr. Chief Justice Taney (pp. 316, 317-318):

"And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. * * *

"It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; *or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.* And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, *or encumbered it with conditions that rendered it useless or impracticable to pursue it.* Blackstone, in his Commentaries on the Laws of England, 1

vol., 55, after having treated of the declaratory and directory parts of the law, defines the remedial in the following words:

'The remedial part of the law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law. When, for instance, the declaratory part of the law has said that the field or inheritance which belonged to Titius's father is vested by his death in Titius; and the directory part has forbidden any one to enter on another's property without the leave of the owner; if Gaius, after this, will presume to take possession of the land, the remedial part of the law will then interpose its office, will make Gaius restore the possession to Titius, and also pay him damages for the invasion.'

"We have quoted the entire paragraph, because it shows, in a few plain words, and illustrates by a familiar example, the connection of the remedy with the right. It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation

upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States. *And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form, affording no protection, and producing no practical result."*

We submit that this forceful reasoning is equally applicable to the case at bar. Under the Fourteenth Amendment there must be a judicial review of the question of confiscation. That review would, however, be in many cases illusive and nugatory, a mere form, affording no protection and producing no practical result, if it were a review simply of the question whether there was any substantial evidence before the Commission to support its order. Occasionally, but not often, a case will be entirely one-sided; and the Fourteenth Amendment might as well not exist if the court is bound in every two-sided case to take the legislature's side.

In *State vs. Morrill*, 16 Arkansas, 384 (1855), the court said by English, C. J. (p. 390):

"The Legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, granted to this court by the consti-

tution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government: and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people."

It would be a clear abridgement of the power of the court, in a case under the Fourteenth Amendment, to require it to sustain legislative action merely because it is supported by some substantial evidence before the legislative body, however incredible the evidence in view of weightier testimony on the other side.

In *Edwards vs. Kearzey,* 96 U. S., 595 (1877), the court said by Mr. Justice Swayne (pp. 600, 602, 607):

"The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' 1 Bac. Abr., tit. Actions in General, letter B. * * *

"The power to tax involves the power to destroy. *McCulloch vs. Maryland,* 4 Wheat., 416. The power to modify at discretion the remedial part of a contract is the same thing. * * *

"The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.

"The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law

of the State which so affects that remedy as *substantially to impair and lessen the value* of the contract is forbidden by the Constitution, and is, therefore, void."

So also, we submit, is action by the legislature which substantially impairs and lessens the value of the remedy in the courts to test the constitutionality of legislative action.

In *Louisiana vs. New Orleans,* 102 U. S., 203 (1880), the court said by Mr. Justice Field (pp. 206-207):

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation *lessens the efficacy of these means* impairs the obligation."

In *Seibert vs. Lewis,* 122 U. S., 284 (1887), the court said by Mr. Justice Matthews, after quoting from the last two cases (p. 295):

"In various forms, but with the same meaning, this rule has been often repeated in subsequent decisions by this court."

In *Chicago, etc., Ry. Co. vs. Minnesota,* 134 U. S., 418 (1890), the court said by Mr. Justice Blatchford (pp. 456-457, 458):

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it con-

flicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, *under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter of controversy,* and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. * * *

"In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that *judicially.* The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Mr. Justice Blatchford is not very specific as to what "judicial investigation" is; but Mr. Justice Miller, in his concurring opinion, is specific, and his opinion has been repeatedly approved in later cases. He said (pp. 460, 461):

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is

by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered. * * *

"But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, *I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.* * * *

"But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have *a right to be heard on the questions relating to such fare, which I have pointed out as judicial questions.* For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just con-

struction of the statute of Minnesota it is for that reason void."

In the case at bar, however, the Superior Court, far from having the freedom which it would have under a bill in chancery, was not even permitted to hear the Water Company on the question of confiscation, but only to determine whether the evidence in support of the Commission's order was substantial. It is a far cry from such a review by the court to that which Mr. Justice Miller thought necessary.

In *McGahey vs. Virginia,* 135 U. S., 662 (1890), the court said by Mr. Justice Bradley, on a writ of error to the state court (p. 694):

> "We also think that the prohibition of expert testimony in establishing the genuineness of coupons was in like manner unconstitutional. * * * To prohibit it is to take from the holder of such instruments the only feasible means he has in his power to establish their validity."

If the prohibition of expert testimony by the legislature is a violation of the Constitution, is it not more plainly a violation to prohibit the consideration of all the testimony adduced against the validity of legislative action? Can this be justified merely because there is some substantial evidence in support of its validity? Clearly not, or the constitutional rights of any citizen may be determined by a legislative majority plus one witness against him.

In *Reagan vs. Farmers' Loan and Trust Co.,* 154

U. S., 362 (1894), the court said by Mr. Justice Brewer (p. 397):

> *"The province of the courts is not changed, nor the limit of judicial inquiry altered,* because the legislature instead of the carrier prescribes the rates."

Can the legislature, then, so change the province of the courts as to confine their inquiry to one side of the case if there is substantial evidence on that side?

In *Smyth vs. Ames,* 169 U. S., 466 (1898), the court said by Mr. Justice Harlan (pp. 527-528):

> "What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. *No one, we take it, will contend that a state*

enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. Art. VI. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether—looking at the cases in the light of the facts as they existed when the decrees were rendered—the Nebraska statute, if enforced, would, by its necessary operation, have deprived

the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them."

It is not an easy task for a court to discharge the duty of examining a voluminous record, but it is a task necessary to the protection of constitutional rights. If the legislature cannot conclusively determine for the people and for the courts that what it authorizes its agents to do is consistent with the fundamental law, and so destroy the right to a judicial inquiry secured by the supreme law of the land, for a like reason it cannot impair that right. To put the right at the mercy of any substantial evidence against the party claiming it is in nearly all cases to destroy it.

In *Western Union Tel. Co. vs. Myatt,* 98 Fed Rep., 335 (C. C., Kansas, 1899), the court (Hook, District Judge) said (p. 342):

> "Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. *Reagan vs. Trust Co.,* 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. Ed., 1014; *Smyth* vs. Ames, 169 U. S., 466, 18 Sup. St., 418, 42 L. Ed., 819. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi* public service, because that is a legislative prerogative, *and that the legislature has no power to forestall the judg-*

ment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent any inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness."

Have we not in the case at bar a plain attempt to forestall the judgment of the courts? A more insidious or dangerous attempt to do so could scarcely be devised.

In *San Jose Ranch Co. vs. San Jose Land and Water Co.*, 126 California, 322 (1899), the court said by Temple, J. (p. 325):

> If the court were erroneously to refuse to receive any evidence for a party, and should arbitrarily determine all issues against him, this court could not determine from the record whether he would have fared better if the evidence had been admitted. * * * *A person against whom such a ruling has been made, and who has lost his case, has been deprived of life, liberty, or property without due process of law."*

Is it not equally a denial of due process to refuse to consider the evidence of a party and arbitrarily determine all issues against it merely because there is substantial evidence on the other side?

In *Chicago, etc., Ry. Co. vs. Tompkins*, 176 U. S., 167 (1900), the court said by Mr. Justice Brewer (pp. 172-173, 179-180):

> "Few cases are more difficult or perplexing

than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. *And yet this difficulty affords no excuse for a failure to examine and solve the question involved.* It has often been said that this is a government of laws and not of men; and by this court, in *Yick Wo vs. Hopkins,* 118 U. S., 356, 369; 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, *that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated.* Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. *Railroad Commission Cases,* 116 U. S., 307; *Dow vs. Beidelman,* 125 U. S., 680; *Georgia Railroad & Banking Co. vs. Smith,* 128 U. S., 174; *Chicago, Milwaukee & St. Paul Railway vs. Minnesota,* 134 U. S., 418; *Chicago & Grand Trunk Railway vs.*

Wellman, 143 U. S., 339; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362; *St. Louis & San Francisco Railway vs. Gill*, 156 U. S., 649; *Covington &c. Turnpike Co. vs. Sandford*, 164 U. S., 578; *Smyth vs. Ames*, 169 U. S., 466.

"It is often said that the legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, *but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far.* * * *

"The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts, deduce the proper conclusion?

"It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. *This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court.* Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. *We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court.* The questions are difficut, the interests are vast, and therefore the aid of the trial

court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth vs. Ames, supra,* a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and findings of fact. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation wreck large property interests."

It is interesting to note the diametrical opposition of the opinion of the learned judge to that of the Supreme Court of Pennsylvania. He insists that parties have a right to a determination of the facts in the first instance by the trial court, and remands the case for that purpose. The Pennsylvania court, on the other hand, after such a determination had been had in this case, set it at naught, without any consideration of its merits, merely because there was some substantial evi-

dence against it. Where in such a case is the necessary judicial review of legislative action?

In *Ex parte Young*, 209 U. S., 123 (1908), the court said by Mr. Justice Peckham (p. 147):

> "In *McGahey vs. Virginia*, 135 U. S., 662, 694, it was held that to provide a different remedy to enforce a contract, which is unreasonable, and which imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given. See also *Bronson vs. Kinzie*, 1 How., 311, 317; *Seibert vs. Lewis*, 122 U. S., 284. If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co. vs. Minnesota*, 134 U. S., 418. *A law which indirectly accomplishes a like result* by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional."

We submit that a law may indirectly accomplish the result of making the decision of a commission conclusive as to the sufficiency of rates just as effectively by making the court hearing onesided in the event that there is substantial evidence on both sides as by establishing penalties *in terrorem*. In either event it results

in a deprivation of property without due process of law.

In *Home Tel. and Tel. Co. vs. City of Los Angeles,* 211 U. S., 265 (1908), the court said by Mr. Justice Moody (p. 278):

> "It must not be forgotten that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, *determine for themselves whether such confiscation exists.*"

We submit that an act of the legislature preventing such an independent determination by the courts, State or Federal, is a violation of the rights of the litigant under the Sixth Article and the Fourteenth Amendment of the Constitution.

In *Commonwealth vs. Emmers,* 221 Pennsylvania, 298 (1908), the court said, adopting the opinion of the court below by Porter, J. (pp. 305-306):

> "The law imposes upon the officer in question the duty of enforcing the health laws of the commonwealth, and this statute clothes him with the power and imposes upon him the duty of ascertaining whether any sewer, maintained by an individual, company or private corporation, is discharging into the waters of the commonwealth material which is a menace to the public health. The act does not make the decision of this official final, it gives the defendant the right of an appeal

to the court of common pleas, a constitutional tribunal clothed with full law and equity powers, and gives him in that court an opportunity to be heard, upon the question whether or not the sewer so maintained involves danger to the public health. The statute placed at the disposal of the defendant this process of law to have determined in a court of competent jurisdiction the primary question, whether the material which he was discharging into the stream had become a menace to the public health; and before he could be convicted of the offense created by the statute he was entitled to a trial in the court of quarter sessions, a court of record in which all misdemeanors are triable, and the burden was upon the commonwealth to establish that he had discharged sewerage into the stream, after a menace to the public health had been determined in the manner by the statute provided. The 14th amendment is not to be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of citizens as they may deem best for tne public welfare without bringing them into conflict with the supreme law of the land; this power of change is limited by the fundamental principles laid down in the constitution. 'Due process of law, is process due according to the law of the land. This process in the states is regulated by the law of the state:' *Walker vs. Sauvinet,* 92 U. S., 90. *The statute in question afforded the defendant a full and fair opportunity to have tried in a court of competent jurisdiction every question that arose,* at the various stages of the proceed-

ings, leading up to his conviction; the statute afforded to every individual, private company and corporation the same opportunity for a trial, under like conditions, in every case; and there can in this case be no allegation that the courts have denied any right which the staute conferred. The conviction of the defendant resulted from due process of law: *Holden vs. Hardy,* 169 U. S., 366."

It is evident that the Pennsylvania court in the case just cited had a juster conception of the meaning of due process of law than it had in the case at bar.

In *State of Washington vs. Fairchild,* 224 U. S., 510 (1912), the court said by Mr. Justice Lamar (pp. 526-527):

"The act further provided that after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the Superior Court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the Commission, *it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence,* since it acted *judicially,* 'under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties.' *Kentucky Railroad Tax Cases,* 115 U. S., 321, 334. * * *

"It had the right to offer all competent testimony before the Commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. *The court would test its correctness by the evidence submitted to the master.*"

Here, then, is the proper conception of the nature of judicial action. A court so acting is obliged "to weigh and consider the testimony" to test the correctness of legislative action. It is not a question merely of the substantiality of the evidence on one side, but rather of the weight of the evidence on each side.

In *Wilmington City Ry. Co. vs. Taylor,* 198 Fed. Rep., 159 (D. C., Delaware, 1912), the court (Bradford, District Judge) said (p. 192):

"As the superior court on appeal is confined to the record of proceedings before the utility board as certified by its secretary, and the appeal must be heard and determined 'on the merits of the matters forming the basis of the order,' it is evident that the traction company, if not permitted by the utility board to present by way of defense to 'a *prime facie* case' made against it matters of law or fact deemed by it essential as affecting the merits, as appears to have been the case here, it would naturally be deterred from taking an appeal, even were it necessary to take one under ordinary circumstances before proceedings in the circuit court of the United States to enjoin the order."

In *Louisville & Nashville R. R. Co. vs. Railroad Commissioners*, 63 Florida, 491 (1912), the court said by Whitfield, C. J. (p. 506):

"In determining whether a rule or regulation of the Railroad Commissioners in its terms or in its practical operation and effect is unreasonable and denies to the carrier its constitutional property rights, *all the facts and circumstances affecting the rights of all interested parties* should be considered. In such consideration *the processes and standards of reasoning and computation that are afforded by law or by common experience and the dictates of right and justice* should be applied. *State ex rel. Railroad Com'rs, vs. Louisville & N. R. Co.*, 62 Fla., 315, 57 South. Rep., 175."

In *Seward vs. Denver & Rio Grande R. R. Co.*, 17 New Mexico, 557 (1913), the court said by Roberts, C. J. (pp. 583-584):

"Passing now to the consideration of the question raised by the railway company, upon the merits of the case, we find objections interposed to certain specific findings of fact made by the commission, the assertion being made that such findings are not supported by the evidence. While it is proper for the commission to make findings of fact, *still such findings can have no force or effect in this court.* Our constitution does not require this court to consider or give any effect to such findings, but enjoins that this court shall 'decide such cases on their merits.' It does not even, as is usually the case, make the order of the commission *prima facie* just and reasonable, but

on the other hand requires this court to pass upon the merits of the case, without indulging in any presumptions. This being true, it is our duty to take the order made by the commission and test its reasonableness and lawfulness by the evidence adduced upon the hearing. *This court forms its own independent judgment, as to each requirement of the order, upon the evidence;* therefore the findings made by the commission, may not be justified by the evidence, yet if the evidence sustains the reasonableness and lawfulness of the order made it would be our duty to uphold and enforce it."

Public Service Gas Co. vs. Board of Public Utility Commissioners, 84 New Jersey Law, 463 (1913), affords a precise parallel upon the point now in question to the case at bar. In that case the court said by Swayze, J. (pp. 466, 467, 468-469):

"Under section 38 we are given jurisdiction to set aside the order of the commissioners when it clearly appears that there was no evidence before the board to support reasonably such order or that the same was without the jurisdiction of the board. On its face this section confers jurisdiction upon this court, but a jurisdiction of a limited character, only to be exercised when it clearly appears that there is no evidence before the board to support their order, or where the order is without their jurisdiction. *If this language is taken literally, we should be powerless in any case within the jurisdiction of the board to set aside its order if there was any evidence to support it, no matter*

how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, *and the legislature cannot limit us* in the exercise of our ancient prerogative. * * *

"The presumption in favor of the acts of a judicial or quasi-judicial tribunal does not apply with the same force to a legislative tribunal, nor to a tribunal which possesses not only to some extent the powers of a court but also to some extent the powers of a public prosecutor. A legislative body prescribing a rule for future conduct is not limited by the same considerations of justice in accordance with existing rules; and one in the position of a public prosecutor can hardly be supposed to preserve a judicial frame of mind; he is rather in the position of one who is judge in his own cause. * * *

"All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the commissioners, it depends upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body.

"We must, therefore, *determine for ourselves upon all the evidence* whether the former rate for gas on the Passaic district was unjust and unreasonable."

The decision was affirmed in *Id. vs. Id.,* 87 New Jersey Law, 581 (1914), and a writ of error to this court was dismissed with costs, per stipulation: 242 U. S., 666 (1917).

With submission, we commend to the Court the reasoning of the learned judge whose opinion has just been quoted. We have here, under all the decisions of this court, a judicial question; and his language is therefore applicable, *mutatis mutandis,* to a discussion of the requirements of the Fourteenth Amendment in this case.

In *Ormsby County vs. Kearney,* 142 Pacific Rep., 803 (Nevada, 1914), Talbot C. J., in his concurring opinion said (p. 812):

> "If the Legislature could give the state engineer power to make final adjudications of water rights, it could authorize him, or some other appointive officer, to make final adjudications of the right to mines, lands, and other property and claims, and divest the courts of the jurisdiction given them by the Constitution, or, if appeal be nominally allowed to the courts, *hedge it about with such expensive and burdensome restrictions as to place it beyond the reach of ordinary litigants.*"

Restrictions on judicial review may be burdensome in other ways than by causing expense; and if they substantially render such review nugatory must be brushed aside as unconstitutional.

In *Wadley Southern Ry. Co. vs. Georgia,* 235 U. S., 651 (1915), the court said by Mr. Justice Lamar (p. 661):

"The methods by which this right to a judicial review are secured vary in different jurisdictions. In some States there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the Commission. *Oregon R. R. & Nav. Co. vs. Fairchild,* 224 U. S., 510; *State ex rel. Railroad Commission vs. Oregon R. R. & Nav. Co.,* 68 Washington, 160, 167; *Seward vs. Denver & R. G. R. R.,* 17 New Mex., 557; 131 Pac. Rep., 980. *Cf. Oregon R. R. & Nav. Co. vs. Campbell,* 173 Fed. Rep., 957, 989. In others by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by Sec. 266 of the Judicial Code as amended (March 4, 1913, c. 160, 37 Stat., 1013, 1014). *But in whatever method enforced, the right to a judicial review must be substantial, adequate and safely available*—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

In *Meeker vs. Lehigh Valley R. R. Co.,* 236 U. S., 412 (1915), the court said by Mr. Justice Van Devanter (p. 430):

"It is also urged, as it was in the courts below, that the provision in sec. 16 that, in actions like

this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts herein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

"This provision only establishes *a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.* At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law."

Contrariorum contraria est ratio. The statute in the case at bar, as construed by the court below, cuts off all defense, interposes a complete obstacle to any contestation of the issues, and takes all questions of fact from the court—all upon a mere showing of some substantial evidence in support of the findings and order of the Commission. We submit that it plainly works a denial of due process of law.

In *Chicago, etc. R. R. Co. vs. Public Service Commission*, 266 Missouri, 333 (1915), the court said by Woodson, C. J. (p. 341):

"Every court and jurist of the State thoroughly understands how a cause in chancery is tried and determined. If not the entire, the full substance of the entire evidence must be brought to this court; and while we will defer somewhat to the

findings of fact made by the trial court, yet we are not arbitrarily bound thereby.

"The trial in this court is practically *de novo*, and after due consideration given *to all the evidence* the court will accept, modify or reject the findings of the circuit court and make such findings as the law and evidence warrant. (Gibbs vs. Haughowout, 207 Mo., 384, l. c., 391).

"The same is true of the findings of the commission in this class of cases."

In *Pacific Live Stock Co. vs. Lewis*, 241 U. S., 440 (1916), the court said by Mr. Justice Van Devanter (pp. 451-452, 454):

"As an alternative to its first contention, which we hold untenable, the plaintiff insists that the statute is repugnant to the due process of law clause of the Fourteenth Amendment; * * * Third, because it requires that the board's findings and order, although only administrative in character, be followed and given effect in the distribution of the water pending the action of the Circuit Court upon them.

"A serious fault in this contention is that it does not recognize the true relation of the proceedings before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence and making an advisory report the board merely paves the way for an adjudication by the court of all the rights

involved. As the Supreme Court of the State has said, the board's duties are much like those of a referee. (And see Oregon R. R. & N. Co. vs. Fairchild, 224 U. S., 510, 526-527.) All the evidence laid before it goes before the court, *where it is to be accorded its proper weight and value.* That the State, consistently with due process of law, may thus commit the preliminary proceedings to the court is not debatable. And so, the fact that the board acts administratively and that its report is not conclusive *does not prevent a claimant from receiving the full benefit of submitting his claim and supporting proof to the board.* * * *

"Considering the nature of the report and that claimants *may oppose it with other evidence,* it is plain that its use as evidence is not violative of due process. *Meeker vs. Lehigh Valley R. R.,* 236 U. S., 412, 430."

In *Lusk vs. Atkinson,* 268 Missouri, 109 (1916), the court said by Bond, J. (p. 117):

"In reviewing a finding of facts made by the Public Service Commission, we do not accord to them that probative effect which would normally belong to the findings and judgment of a court of law in the course of regular judicial proceedings."

In *Oregon Lumber Co. vs. East Fork Irrigation Dist.,* 80 Oregon, 568 (1916), the court said in a *per curiam* opinion (p. 573):

"The validity of this legislation is discussed and affirmed In re Willow Creek, 74 Or. 592 (144 Pac. 505, 146 Pac. 475), in an opinion by Mr.

Justice Bean. The argument need not be repeated here. It is sufficient to say that it provides for notifying all parties concerned in the stream involved, for expert measurement and examination, for adjustment and settlement by the board of relative rights and priorities, for contest of the correctness of the board's findings by exceptions thereto supported by additional testimony, and ultimately for a decree of the Circuit Court embodying final results. Thus is preserved for every party in interest due process of law, *for all have the constitutional 'day in court' before a judicial tribunal endowed with jurisdiction to hear and determine the issues."*

Public Service Commission vs. Cleveland, C., C. & St. L. Ry. Co., 121 Northeastern Rep., 116 (Indiana, 1918), is squarely against the holding that a court, in reaching the first judicial determination of the facts on which the order of a public service commission is based, may, in the teeth of the decisions of this court, be prevented from making such findings as seem right and just to it after considering and weighing the evidence, merely because there may have been substantial evidence to support the finding of the commission. Such was the holding of the Pennsylvania court in the case at bar. But, as the Indiana court said, by Lairy, J. (p. 118):

"It has been frequently decided that the functions vested by the Legislature in commissions, such as our Public Service Commission, are not judicial in their nature, but that they are administrative in character. Southern Ind. R. Co. vs.

Railroad Com'n (1908) 172 Ind., 113, 87 N. E., 966; Chicago, etc., R. Co. vs. Railroad Com'n (1911) 175 Ind., 630, 95 N. E., 364; Chicago, etc., R. Co. vs. Minnesota, 134 U. S., 418, 10 Sup. Ct., 462, 33 L. Ed. 970. This being true, it follows that the proceedings before such body are not judgments, but are administrative orders. Under the statute a party aggrieved by an order of the commission may file an action in court to have the order annulled and set aside. *This affords him his first opportunity to have the facts on which the order rests judicially determined. In reaching a judicial determination as to the reasonableness or justness of an order the court could not be bound and controlled by the findings of an administrative body as to the facts on which such order was based.* In the case of Chicago, etc., R. Co. vs. Minnesota, supra, it was held that any order reducing the rates of a railroad company deprived such company of a part of the proceeds of its property, and thus in effect constituted a deprivation of property within the meaning of the Fourteenth Amendment to the federal Constitution, which inhibits a state from depriving any citizen of property without due process of law. In that case it was held that the questions involved were of a judicial nature, and that the parties interested had a right to a judicial hearing and determination of such questions. It was further decided that a determination by the commission was not of a judicial nature, and did not afford due process of law, and that if the order of the commission was held to be conclusive on the courts, and if no pro-

vision was made for a judicial hearing and determination of the facts involved, due process of law was denied and the law invalid for that reason.

"The fact that there may have been some evidence before the commission to sustain every material fact upon which the order was based could not prevent the court from making such findings as seemed right and just to it after considering and weighing the evidence adduced at the trial; and a decision by the court on a question of fact contrary to that arrived at by the commission would not be contrary to law, *even though there may have been substantial evidence to support the finding of the commission.*

"The question as to the sufficiency of the evidence to sustain the decision of the trial court still remains for consideration. In passing on this question, this court cannot weigh evidence, but must sustain the decision if there is any substantial evidence on which it can rest. Indiana H. B. R. Co. vs. Public S. Com'n (1918) No. 23446, decided at this term of court, 121 N. E. 540."

Here, we submit, is the sound view. The *legislature* cannot, on the mere basis of some substantial evidence, conclude the court's investigation of the constitutionality of its action. But when the *court* has acted, then the rule as to substantial evidence has proper application. But the Pennsylvania Supreme Court, by its construction of the statute, denied due effect to the judicial action of the Superior Court, and thus made the commission and not the court the supreme arbiter of the validity of its own conduct. Per-

haps this could be done before 1868, but we respectfully submit that it cannot be done now.

In the latest case which we have found upon this branch of the argument, as in all the earlier ones, the rule as to proper judicial inquiry is laid down against the holding of the Pennsylvania Supreme Court. In *Donham vs. Public Service Commission,* 122 Northeastern Rep., 397 (Massachusetts, 1919), the court said by Rugg, C. J. (p. 406):

> "When *constitutional* questions are involved the court will examine the report of the public service commissioners *for the purpose of reaching its own conclusions, not fettering its discretion or judgment by artificial rules as to its weight,* but attributing to it and to its several parts all the force and effect to which its substance and a consideration of the expert nature of its investigations and conclusions naturally entitle it. Knoxville vs. Knoxville Water Co., 212 U. S., 1, 8, 29 Sup. Ct. 148, 53 L. Ed. 371."

We said at the beginning of this argument that the Pennsylvania court is alone in the construction which it gave to the act. We submit that we have shown that it is not only alone, but wrong, and constitutionally wrong. It is not a case of *Athanasius contra mundum.*

It remains for us to perform the promise to point out what we believe to be the cause of the error into which the court fell. To do so we have retained for consideration until this time certain cases in this court upon which the learned court below relied.*

*Citations of these cases, with comments thereon, follow from this point to p. 157.

The first of these cases is *Interstate Commerce Commission vs. Illinois Central R. R. Co.*, 215 U. S., 452 (1910). From the opinion of the court, by the present Chief Justice, we quote the entire paragraph of which the concluding words only are quoted (R., vol. I, p. 113) by the Pennsylvania Supreme Court (p. 470):

> *"Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, a, all relevant questions of constitutional power or right;* b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Cable Company vs. Adams, 155 U. S., 688, 698. *Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided,* it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a

lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

We have in the case at bar, as we have shown, a controversy as to constitutional power or right, that is, whether the plaintiff in error has been deprived of its liberty and property without due process of law by being denied a reasonable return upon the fair value of its entire property. The plaintiff in error had the right to a judicial consideration of all the testimony relevant to this controversy. Such consideration is of the essence of judicial authority in such a case, and should not be curtailed or avoided. But the court below did avoid it and did permit the consideration by the Superior Court to be curtailed. It treated the case, in other words, as if it involved no question of constitutional power or right. If it did not, then it may be granted that the Superior Court usurped merely administrative functions. But the constitutional power of the Commission was involved, because its order was claimed to be based on an erroneously low valuation of all the Water Company's property. This is a very different matter from an order of the Interstate Commerce Commission as to the distribution of coal cars. The latter could not conceivably deprive the Illinois Central Railroad Company of a fair return from all its business; the order in this case, from the nature of the thing, could, and as a matter of fact did, work such a result. In the case of an order of the one kind administrative or legislative action may bind the courts; in the case of an order of the other kind it cannot, or else the Constitution of the United States is merely a compendium of advice to the legislature.

The next case relied upon by the court below is *Interstate Commerce Commission vs. Union Pacific R. R. Co.*, 222 U. S., 541 (1912). Mr. Justice Lamar, delivering the opinion of the court, said (p. 547):

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) *beyond the power which it could constitutionally exercise;* or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) *the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law;* or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Int. Com. Com. vs. Ill. Cent., 215 U. S., 452, 470; Southern Pacific vs. Int. Com. Com., 219 U. S., 538, 544; Int. Com. Com. vs. Alabama Midland Ry. Co., 168 U. S., 144, 174."

It needs no further argument to show that the present case comes within the first and the fourth of the cases excepted by the learned judge from final action by a legislative commission. But the learned court be-

low failed unaccountably to perceive the nature of the case or the meaning of this court's opinion, and did no more than look into the question whether the Commission's action was purely arbitrary and without evidence to support it.

The distinction which the court below overlooked is clearly set forth by this court, speaking by Mr. Justice Hughes, in *Northern Pacific Ry. Co. vs. State of North Dakota*, 236 U. S., 585 (1915), at p. 599:

> "As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. San Diego Land & Town Co. vs. Jasper, 189 U. S., 439; Louisville & Nashville R. R. vs. Garrett, 231 U. S., 298, 313. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review *a particular tariff or schedule* which yields substantial compensation for the services it embraces, *when the profitableness of the intrastate business as a whole is not involved.*
>
> "But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation *even though the entire traffic to which the rate is applied is taken into account.* On that fact being satisfactorily established, the presumption of reasonableness is rebutted."

In the case at bar the profitableness of the business as a whole is involved, not merely a particular tariff or

schedule, and the courts cannot constitutionally be deprived of power to concern themselves with the whole case and all the testimony, so far as it bears upon the question of confiscation.

The latest case relied upon by the learned court below is *People of the State of New York vs. McCall,* 245 U. S., 345 (1917). But in that case Mr. Justice Clarke, delivering the opinion of the court, used very apt language (not quoted by the Pennsylvania court) to avoid the inference which that court drew from the decision (pp. 348-349):

> "It is the result of these and similar decisions, that while in such cases as we have here this court is confined to *the federal question involved* and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, *yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied,* as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution."

In the case at bar the Federal constitutional right claimed to have been denied is the right to a fair return on the value of all the Water Company's property, and

all the evidence therefore had to be analyzed and balanced by the court. It was not merely a question as to whether there had been arbitrary or capricious action, the comparatively narrow issue in a case such as the *McCall* case, of which this court said (p. 350):

> *"There is no showing in the record as to the fair value of the entire property of the Gas Company used in the public service, nor of the rate of return which it was earning thereon, and therefore even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable.* Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission, 206 U. S., 1, 24-6; Missouri Pacific Ry. Co. vs. Kansas, 216 U. S., 262; Puget Sound Traction Co. vs. Reynolds, 244 U. S., 574, 580."

The language of the New York court in that case is similarly guarded to avoid its extension to a case like the one at bar. See *Id. vs. Id.*, 219 N. Y., 84 (1916), per Cuddeback, J., at p. 88:

> "It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control."

In short, the present case is one involving the whole return on all the property, *the very life,* of this water company. In such a case it must have a judicial inquiry, *not merely of arbitrariness but of value.* But the

Pennsylvania Supreme Court treated the case as if it involved an ordinary legislative or administrative order which, if it was supported by any evidence, and was not a mere arbitrary act, could not be said to violate any constitutional right. It set aside the decree of the Superior Court protecting the constitutional right against confiscation, and thereby let the legislature through its commission take property without let or hindrance from the courts. For this seriously prejudicial error there must, we submit, be a reversal of the State court's decree.

(D) THE CASE IS NOT ALTERED BY THE POSSIBILITY OF RELIEF IN THE FEDERAL COURTS.

We might well leave this branch of our argument at this point, but out of abundant caution we wish to point out that it is not impaired by the statement in *Home Tel. and Tel. Co. vs. City of Los Angeles,* 211 U. S., 265, 278 (1908), "that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists."

Under the Fourteenth Amendment the question of confiscation *vel non* is a judicial question, and *must* be determined by any court, State or Federal, for itself. Grant that the Federal courts will so determine

it: that does not give a State legislature power to prevent the State courts from so determining it. The burden of upholding the Federal Constitution cannot be thrown entirely on the Federal courts. A litigant cannot be compelled, if he wishes to have a judicial determination of his constitutional rights by a court of first instance, to resort to the Federal court instead of the State court designated by the statute. To any contention to the contrary the Constitution itself answers in unmistakable terms (Article VI, clause 2):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"

A brief review of a few leading cases under the Fourteenth Amendment will show that any rights arising under it must be enforced alike by State and Federal courts.*

In *Virginia vs. Rives,* 100 U. S., 313 (1879), the court said by Mr. Justice Strong (p. 318):

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, *or its judicial authorities;* and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

*Citations of cases bearing upon this subdivision of our argument, with comments thereon, follow from this point to p. 166.

The amendment, as we have seen, requires a judicial review of the question of confiscation by a commission's order fixing all the rates of a public service company. The prohibition against denying such a judicial review applies, therefore, to a State court, as well as to any other State agency. When such a court declines to exercise that right of review, on the ground that the legislature has forbidden it or on any other ground, or when it permits the exercise of that right to be substantially impaired, it sets aside the plain requirement of the Constitution. The taking away of the liberty of a company to fix rates by a decree made in such a manner is a denial of the due process of law guaranteed by the fundamental law, and cannot be tolerated in any court of any State.

The principle is laid down by the court still more forcibly in *Ex parte Virginia*, 100 U. S., 339, again speaking by Mr. Justice Strong (pp. 346-347):

> "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. • • •
>
> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States,.....nor deny to any person within its jurisdiction the equal pro-

tection of the laws.' They have reference to actions of the political body denominated a State, *by whatever instrument or in whatever modes that action may be taken.* A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that *no agency of the State, or of the officers or agents by whom its powers are exerted,* shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. *Then the State has clothed one of its agents with power to annul or to evade it.*"

In *Neal vs. Delaware,* 103 U. S., 370 (1880), the court said by Mr. Justice Harlan (pp. 389-390, 397):

"The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, *as binding on all of its citizens and every department of its government,* and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes. • • •

"The action of those officers in the premises is to be deemed the act of the State; and *the re-*

fusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States."

In *Robb vs. Connolly,* 111 U. S., 624 (1884), the court said by the same learned judge (p. 637):

"Upon the State courts, *equally with the courts of the Union,* rests the obligation to guard, enforce, and protect *every* right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'"

In *Scott vs. McNeal,* 154 U. S., 34 (1894), the court said by Mr. Justice Gray (p. 45):

"The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authori-

ties. *Virginia vs. Rives,* 100 U. S., 339, 346; *Neal vs. Delaware,* 103 U. S., 370, 397. And the first one, as said by Chief Justice Waite in *United States vs. Cruikshank,* 92 U. S., 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia vs. Okely,* 4 Wheat. 235, 244, was intended *'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"*

To a like effect are the opinions of the court in *Gibson vs. Mississippi,* 162 U. S., 565 (1896), by Mr. Justice Harlan at p. 591, and in *Chicago, etc., R. R. Co. vs. Chicago,* 166 U. S., 226 (1897), by the same learned judge at pp. 233-234.

The principle was again laid down in a case involving a like question to the one here litigated, *Smyth vs. Ames,* 169 U. S., 466 (1898), the court speaking this time also by Mr. Justice Harlan (pp. 527-528):

"The duty rests upon *all* courts, *Federal and state,* when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

See also *San Diego Land and Town Company vs. National City,* 174 U. S., 739 (1899), per Mr. Justice Harlan at p. 754, applying the principle in a water-rate case; *Raymond vs. Chicago Union Traction Co.,* 207 U. S., 20 (1907), per Mr. Justice Peckham at pp. 35-36, applying it in a tax case; *Ross vs. State of Oregon,* 227 U. S., 150 (1913), per Mr. Justice Van Devanter at pp. 162-163, applying it in the case of an *ex post facto* law.

But there is no need to multiply examples. The fact is, as the plain words of the Sixth Article of the Constitution show, that it applies in any and every case; and for the failure to apply it in the case at bar the decree of the learned court below should be reversed.

One more citation, and we have done with our review of the authorities. In *Home Tel. and Tel. Co. vs. City of Los Angeles,* 227 U. S., 278 (1913), this court, speaking by the Chief Justice, laid down a clear and indubitable principle as to the extent of the guarantees of the Fourteenth Amendment (pp. 295-296):

> "While the guarantees of the Fourteenth Amendment cover subjects not included in the contract clause, since the former embraces *every manifestation of state power* and the latter is concerned only with legislative power when exerted so as to impair contracts, yet the fundamental assertion of Federal power made by each Amendment is *the same* when the different subjects to which each is applicable are put out of view. To illustrate: The command of the Fourteenth Amendment 'No

State shall make any law abridging.....nor shall any State deprive any person,' etc., is in substance a manifestation of the same power exerted in the contract clause, saying 'No State shall pass,' etc. This being true, as it must be, the fact that from the foundation of the Government the contract clause has been enforced without any intimation that the power manifested by the clause was restricted by limitations such as those which it is here insisted limit the power to enforce the guarantees of the Fourteenth Amendment, affords the most conclusive demonstration of the unsoundness of the contentions here made. The immediate and efficient Federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment."

What is forbidden by the Fourteenth Amendment may be tested, therefore, by what is forbidden by the contract clause. Let us make the test. "No State shall .....pass any.....Law impairing the Obligation of Contracts" (Constitution, Article I, Section 10, clause 2). Can a State legislature provide that no court of the *State* shall refuse to enforce a State law upon the ground that it impairs the obligation of a contract? Would such a statute be constitutional as leaving unimpaired the right of recourse to the *Federal* courts to attack its validity? Clearly not; and for a like reason the statute involved in the case at bar cannot impair in the *State* courts the right to a judicial review

guaranteed by the Fourteenth Amendment, merely because the courts of the *United States* are open to hear both sides whenever a rate-fixing order of the Commission is called in question as depriving a person of his liberty or property without due process of law.

(E) CONCLUSION.

We submit that we have shown that the decisions of this court, as well as those of other tribunals, establish (*a*) that the order of the Public Service Commission in this case, fixing all the rates of the plaintiff in error, was purely a legislative act; (*b*) that the plaintiff in error was entitled under the Fourteenth Amendment to a judicial inquiry into the question whether this legislative act amounted to a confiscation of its property; (*c*) that the plaintiff in error was denied such a judicial inquiry in the State courts by the construction given to the Public Service Company Law by the court below, refusing to the State court having the power to review the orders of the Commission the right to set them aside, merely because there was some substantial evidence to sustain them; and (*d*) that this denial of a constitutional right is not condoned by the fact that there was an alternative mode to obtain relief from the Commission's order, by suit in a Federal court.

We have, throughout our argument, treated the construction given to the statute by the Supreme Court of Pennsylvania as binding on this court, and have maintained that, as so construed, its effect *in this case*

was to deprive the Water Company of its property without due process of law. It amounts to the same thing, and would, perhaps, be quite as accurate, not to deny the constitutionality of the statute at all, but to say only that the *erroneous construction* given to it in this case worked an unconstitutional result. See *Scott vs. McNeal*, 154 U. S., 34 (1894), per Mr. Justice Gray, at p. 45; *Willoughby on the Constitution*, vol. 2, sec. 472. Or the error may be described as being in the unconstitutional application to this case of a rule designed by the legislature for cases not involving the entire revenue of a public service company. The distinctions are unimportant in themselves, and there is no need to choose between the various statements of the case. We have referred to them merely to point out that, by whatever line of reasoning the result is arrived at, a reversal will not involve any attack on the Public Service Company Law as a whole. It will amount merely to an adjudication that, *where the question is raised whether a commission's order has fixed the entire revenue of a public service company on the basis of too low a valuation of its property, a limitation on the judicial consideration of that question, which would require a court to sustain the order if there is any substantial evidence to support it, is void under the Fourteenth Amendment.*

If the Court is of this opinion, what disposition should be made of this case? It will be observed that the plaintiff in error duly raised the question of confiscation under the Fourteenth Amendment on appeal from the Commission to the Superior Court, and that the seven judges of that court, upon a judicial investigation, unanimously held that the valuation fixed by

a majority of the Commission was too low and ordered the Commission to reform the valuation and schedule of rates accordingly. The Supreme Court, on appeal from this order, did not dispute it on the merits, but held merely that there was substantial evidence to sustain the order of the Commission, reversed the order of the Superior Court, and reinstated the order of the Commission. By this decree the plaintiff in error was deprived of the judicial investigation by the State court to which it was constitutionally entitled. We submit, therefore, that the proper decree to be made by this court is *that the decree of the Supreme Court of Pennsylvania be reversed and the decree of the Superior Court be reinstated, all costs in the case to be paid by the defendants in error.* By such a decree only, we maintain, can the benefit of the judicial review in the State court of first instance, to which the plaintiff in error was constitutionally entitled, be restored to it.

Of course, however, we freely admit that the decree of the Superior Court, as well as that of the Supreme Court of Pennsylvania, is open to question on this writ of error; and if the findings of the former court (the latter, in accordance with its construction of the statute, made no findings) are regarded by this court as affording an inadequate basis for the immediate disposition of the case, it may be remanded for a further judicial review, as was done in *Chicago, etc., Ry. Co. vs. Tompkins,* 176 U. S., 167 (1900). Of the adequacy and correctness of the findings we shall have more to say hereafter. But if there be further review, we submit that it must be a judicial review, and not a

surrender of the judicial function to the legislative body whose act is in question.

In closing this portion of our argument, perhaps we may be permitted to say that we are not unmindful of the fundamental importance of the question which we have discussed. It deserves a better argument than ours. It *deserves* a better argument, but it *needs* none. For the argument of it is already writ large in the opinions of illustrious men who for more than a century have distinguished this court. It is an argument that interposes no obstacle to genuine progress. It is an argument that has enabled governments to adopt progressive measures in confidence, knowing that they will not be permitted to destroy fundamental individual and social rights. To the question whether the regulation of public businesses may be committed to an expert body, enabled by its daily labors to acquire peculiar and specialized knowledge, this argument answers Yes. It is not afraid of government by commission. To the question whether governmental powers, legislative, executive, and judicial, may be entrusted to such a body, it answers Yes. It denies to a commission no powers save one, and that is to determine whether its own conduct is in accord with the Constitution. This power, and this power alone, it reserves without restrictions to the courts, to judges learned in the fundamental law; and the reservation is indispensable if the government is to be one of laws, and not of men. To use the words of a recent acute observer of our institutions dealing with this very question (*Laski, Authority in the Modern State,* pp. 101-102):

"It has been the habit of past years to sneer

rather elaborately at Bills of Rights. It may yet be suggested that with the great increase of state activity that is clearly foreshadowed there was never a time when they were so greatly needed. Here, as elsewhere, the human needs the satisfaction of which history has demonstrated to be essential must be put beyond the control of any organ of the state; that, and no more than that, is what we mean today by natural rights. Governmental power is a thing which needs at every stage the most careful regard; and it is only by judicial control in terms of those rights that the path of administration will become also the path of justice."

(APPENDIX TO HEADING III.)

THE PENNSYLVANIA SUPREME COURT STANDS ABSOLUTELY ALONE IN ITS POSITION IN THIS CASE. IN A CASE INVOLVING THE ENTIRE REVENUE OF A PUBLIC SERVICE CORPORATION NO COURT IN THIS COUNTRY HAS EVER ADOPTED A SIMILAR VIEW AS TO THE POWERS OF A COURT REVIEWING AN ORDER OF A COMMISSION. ON THE CONTRARY, THERE IS A GREAT WEIGHT OF AUTHORITY DIAMETRICALLY OPPOSED TO THE DECISION OF THE PENNSYLVANIA SUPREME COURT.

Referring to the provisions of the Pennsylvania Public Service Company law hereinbefore quoted (*Ante*

pp. 43-50) it should be noted that Article VI, section 18, requires the record, *including the testimony taken before the Commission,* to be certified by the Commission to the Superior Court of Pennsylvania on appeal; section 22 requires the Superior Court *upon the record certified to it* to determine whether or not the Commission's order is *reasonable* and in conformity with law; section 23 provides that the order of the Commission shall be *prima facie* evidence of the reasonableness thereof and that the burden of proving the contrary is on the appellant, also that the *notes of testimony,* certified as aforesaid, shall be *considered* by the court as the testimony in the case; section 24 provides, in substance, that the Superior Court may reverse the Commission's order if, *upon the record,* it finds that the order is (a) unreasonable, or (b) based upon incompetent evidence materially affecting the same, or (c) otherwise not in conformity with law. What would be the purpose of the careful provision that the evidence must be certified to the Superior Court as part of the record if the court did not have the power to examine the evidence and reverse the Commission on questions of fact? The act does not say that the order of the Commission is conclusive, but merely that it is *"prima facie"* evidence of the reasonableness thereof. The meaning of this term is well settled in the law. In *Kelly vs. Jackson,* 6 Peters (31 U. S.), 622, Mr. Justice Story said (p. 631):

> "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose."

To the same effect is *United States vs. Wiggins*, 14 *Peters* (39 U. S.) 334 (see p. 346).

In *Grafton County Electric Light and Power Co. vs. State*, 77 N. H., 490 (1915) the Supreme Court of New Hampshire (p. 499) referred to the provisions of the statute of that State on appeals from the orders of the Public Service Commission to the effect that "all findings of the commission upon all questions of fact properly before it shall be deemed *prima facie* lawful and reasonable," etc. Upon the question of the proper interpretation of this expression the court said (p. 504):

> "The burden, therefore, rests with the appellants to satisfy the court that upon the evidence the findings are erroneous. *The fact that they are merely prima facie disposes of the contention that they were intended to stand, like the findings of a jury, if supported by any evidence.* The legislature plainly intended to submit to the appellate tribunal the validity upon the evidence of the commission's findings of the evidentiary facts upon which the justice and reasonableness of the order appealed from might depend. The term '*prima facie*' imports merely that there was evidence upon which the finding could be made. *Webster Dict.* Whether the finding should be made is the question upon appeal."
>
> (The italics are ours.)

In *Atchison, T. & S. F. Ry Co. vs. State et al.*, 23 Oklahoma, 210 (1909), the Supreme Court of Oklahoma sustained an order of the Corporation Commission requiring a telephone to be installed in a station of the

Railway Company at Skedee, Oklahoma. The court had occasion to consider section 22 of Article IX of the constitution of Oklahoma (Oklahoma Constitution, Snyder's Ed., p. 260), which provided, with respect to appeals from the Corporation Commission, among other things, as follows: "provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct, etc. Discussing the meaning of the term "*prima facie*" in this connection the Supreme Court of Oklahoma said (p. 223):

> "It simply means that, in considering the testimony and the record upon which the order was based, the presumption arises in the Supreme Court that the order thereon made is to be regarded as *prima facie* just, reasonable, and correct, such presumption subject to be overcome by evidence that may be in the record that clearly rebuts the same.
>
> Such presumption arising in favor of the order, while a strong one, *is not one of a conclusive character. It will give way to a fair exhibition of the contravailing evidence in the record.* The presumption given by this provision in favor of the Commission's order belongs to that class of *prima facie* orders or presumptions that are rebuttable, and *will yield to the legitimate recitals of the record or the probative force of the evidence in the record.* It casts upon the appellant the burden of making it clearly appear to the reviewing body that the order made by the Commission is erroneous. The appellant cannot with hope of success ask the revising tribunal to overthrow the findings of the Commission upon vague inferences or remote pos-

sibilities. It will fail unless it overcomes the presumption by making error manifest."

(The italics are ours.)

In *Meeker, surviving partner of Meeker & Co., vs. Lehigh Valley Railroad Co.*, 236 U. S., 412 (1915), the Supreme Court referred (p. 430) to the provisions of the Act to Regulate Commerce to the effect that "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated," etc. Mr. Justice Van Devanter, delivering the opinion of this court, said (p. 430), on this point:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence."

In *Murray vs. Public Utilities Commission*, 27 Idaho, 603 (1915), the Supreme Court of Idaho reaches the same conclusion as to the meaning of the term *"prima facie"* in the Idaho Public Utility Law (see page 618).

In *Morgan's L. & T. R. & S. S. Co. vs. Railroad Commission of Louisiana*, 53 Southern Reporter, 890 (1910), the Supreme Court of Louisiana said (p. 899):

"The case of *Railroad Commission vs. Cumberland, etc., Co.*, 212 U. S., 423, 29 Sup. Ct., 361 (53 L. Ed., 557), is cited on behalf of defendant, to the effect that,

'The rates • • • must be regarded as *prima facie* fair and valid, or, in other words,

the onus was upon the complainant to show that they were, what it asserts, confiscatory and unreasonable.'

No one will dispute the correctness of the rule thus stated, and we are of opinion that as the members of the Railroad Commission are sworn officers, acting without interest or prejudice, their rulings are to be accepted as correct until shown to be incorrect. But any party interested has the constitutional right to appeal to the courts upon the question whether a rate established by the Commission is just and reasonable or otherwise, and may, by evidence, destroy the *prima facie* presumption in its favor; otherwise he could take nothing by his appeal."

In *People ex rel. vs. Rose,* 207 Ill., 352 (1904), the Supreme Court of Illinois said (p. 361):

"It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary."

As a demonstration that the Pennsylvania Supreme Court stands absolutely alone in its position, we respectfully direct the attention of the court to the following authorities:

UNITED STATES.

In *Oregon R. R. & N. Co. vs. Fairchild,* 224 U. S., 510 (1912), the railroad commission of the State of Washington ordered certain track connections. This

order was upheld by the Superior Court of Thurston County and by the Supreme Court of the State of Washington but, being brought before this court, by writ of error, on the ground that the railroad's property was being taken without due process, this court reversed the judgment of the Supreme Court of the State of Washington. In that case, referring to the trial in the Superior Court of Thurston County, this court, speaking by Mr. Justice Lamar, said (p. 526):

> "On that trial the court was not bound by the finding of fact, but, like the Commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, 'under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties.' *Kentucky Railroad Tax Cases,* 115 U. S., 321, 334."

There is nothing in the Washington statutes which specifically provides that the court is to weigh and consider the testimony. The statutes in question are an Act of the State of Washington approved March 7, 1905, Session Laws of 1905, p. 145, and an amending act approved March 16, 1907, Session Laws of 1907, p. 536. Both the Act of 1905 (p. 148) and the Act of 1907 (p. 539) provide, with respect to reviewing the order of the Commission, in substance, that any railroad, etc., may institute proceedings in the Superior Court "and have such order reviewed and its reasonableness and lawfulness inquired into and determined." This statute gives no broader powers to the Superior Court of the State of

Washington than the Pennsylvania Public Service Company Law gives to the Superior Court of Pennsylvania on appeals from the Pennsylvania Commission. Therefore, this Court has ruled that the trial Court is not bound by the findings of the Commission but that it is obliged to weigh and consider the testimony, etc., in a case in which the question of confiscation arises.

FLORIDA.

In *L. & N. R. R. Co. vs. Railroad Commission,* 63 Fla., 491 (1912), the Supreme Court of Florida lays down the principle as follows (p. 506):

> "Where Railroad Commissioners act within their powers the ultimate question is the reasonableness of the action taken. The reasonableness of administrative rules and regulations as they affect private rights secured by the constitution is to be determined ultimately by the courts. In determining whether a rule or regulation of the Railroad Commissioners in its terms or in its practical operation and effect is unreasonable and denies to the carrier its constitutional property rights, *all the facts and circumstances affecting the rights of all interested parties should be considered. In such consideration the processes and standards of reasoning and computation that are afforded by law or by common experience and the dictates of right and justice should be applied. State ex rel. Railroad Com'rs. vs. Louisville & N. R. Co.,* 62 Fla., 315, 57 South. Rep., 175."
>
> (The italics are ours.)

In *State vs. Florida East Coast Railway Company,* 67 Southern Rep., 906 (Supreme Court of Florida, 1915), the court refused a writ of mandamus applied for to require the Railway Company to conform to an order of the Railroad Commissioners directing that a station be established at Mims, Florida. In other words, the court held the order of the Railroad Commissioners to be unreasonable. In deciding this question, the Supreme Court of Florida fully considered the evidence and decided the question of fact contrary to the decision of the Railroad Commissioners. The court said (p. 911):

> "The Railroad Commission Act of this State, and the amendments thereto, contemplate that the Commissioners shall inquire into the necessities which seemingly demand their attention and base their determination upon the evidence before them. If it is made to appear that these requirements of the statute were not observed, that the order was made without any evidence before the Commissioners in support of the necessity or propriety of it, *or clearly contrary to the evidence,* the order will be deemed to have been made without authority of law, and therefore not possessing the status of *prima facie* reasonableness."
>
> (The italics are ours.)

The Florida statute with reference to the weight to be given to the order of the Railroad Commissioners is as follows:

As to rates (Ch. 4700, Acts 1899, Sec. 8; ch. 6527, June 7, 1913, Sec. 6, amending Sec. 2899, Gen. St. [Comp. Laws Ann., Sec. 2899]):

"Said Commissioners shall make and furnish * * * a printed or written schedule of just and reasonable rates and charges for transportation * * * and such schedule * * * shall be admitted in evidence without necessity for other proof, and shall * * * be deemed and taken in all the courts of this State as *prima facie* evidence that the rates fixed in such schedule or schedules are just and reasonable rates or charges * * *."

As to other orders (Ch. 4700, Acts 1899, Sec. 6; Ch. 6527, June 7, 1913, Sec. 3, amending Sec. 2893, Gen. St.):

"* * * 13. * * * All rules and regulations made and prescribed by the Commissioners shall be made *prima facie* evidence in the manner that the schedules are made *prima facie* evidence. Every rule, regulation, schedule or order heretofore or hereafter made by the Commissioners shall be deemed and held to be within their jurisdiction and their powers, and to be reasonable and just and such as ought to have been made in the premises and to have been properly made and arrived at in due form of procedure and such as can and ought to be executed, unless the contrary plainly appears on the face thereof or be made to appear by clear and satisfactory evidence, and shall not be set aside or held invalid unless the contrary so appears. * * *"

IDAHO.

In *Murray vs. Public Utilities Commission*, 27 Idaho, 603 (1915), there was an appeal from the order of the Public Utilities Commission of Idaho fixing water rates. In determining the value of the property for rate making purposes, the Commission fixed the value of a certain water right at $2,000. The Idaho court held that the Commission erred in not placing a sufficient value upon this water right and reversed the order of the Commission in the following language (p. 623):

> "The order of the Public Utilities Commission is reversed, and the cause remanded with instructions to the commission to entertain further proceedings in accordance with the views herein expressed."

In that case, the court referred to the powers of the court and to the Idaho statute in the following language (p. 618):

> "The function of this court in reviewing an order of the commission is defined by the act as follows:
>
> 'Sec. 63 (a) (Sess. L. 1913, 286) * * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of Idaho and whether the evidence is sufficient to sustain the findings and conclusions of the commission. The

findings and conclusions of the commission on questions of fact shall be regarded as *prima facie* just, reasonable and correct. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.'

In speaking of the same matter, in the case of *Idaho Power, etc., Co. vs. Blomquist,* 26 Ida., 222, at 256, 141 Pac., 1083, this court said: 'This court is there given substantially the same authority in reviewing such orders as on appeal. It has the same record before it that the commission had and may determine whether the evidence is sufficient to sustain the findings and conclusions of the commission, and in so doing must weigh the evidence. It may decide whether the orders of the board are unlawful or whether they violate a right of the petitioner under the constitution of the United States or the State of Idaho, and whether the evidence is sufficient to sustain the findings and conclusions of the commission. It will thus be seen that this court is given ample power to review the orders of the commission and to correct any mistakes that may have been made.' "

On the question of furnishing guidance to the Commission, the court said (p. 621):

"Since we hold that the commission erred in this regard, the order of the commission must be reversed, so far as the fixing of rates is concerned. However, we think it best, for the guidance of the commission and parties, to express our views as to the other specifications of error relied upon by petitioner."

Following this statement, the court set forth a number of different matters which the commission should consider in making its order; the court even went into such details as office furniture, horses, wagons, tools, materials on hand and cost of improving ground around reservoir (p. 622), reciting that these items should be considered if they represented investment reasonably necessary to the successful carrying on of the business.

MASSACHUSETTS.

Donham vs. Public Service Commission, 122 Northeastern Rep., 397 (1919), was a case involving the rates of a street railway company, in which a petition in equity was filed attacking the report and order of the Public Service Commission of Massachusetts. The report of the case shows (p. 398) that the allegations of fact contained in the petition were admitted by the answer. The Supreme Court of Massachusetts speaking by Rugg, C. J. said (p. 406):

> "When *constitutional* questions are involved the court will examine the report of the Public Service Commissioners *for the purpose of reaching its own conclusions, not fettering its discretion or judgment by artificial rules as to its weight*, but attributing to it and to its several parts all the force and effect to which its substance and a consideration of the expert nature of its investigations and conclusions naturally entitle it. Knoxville vs. Knoxville Water Co., 212 U. S., 1, 8, 29 Sup. Ct., 148, 53 L. Ed., 371." (The italics are ours.)

The statutory provision with respect to reviewing the rulings or order of the commission and the weight to be given the same appear in Section 27 of Chapter 784 of the Acts of 1913, (Acts and Resolves of Massachusetts for 1913, p. 815 at p. 831), which section is as follows:

> "The supreme judicial court shall have jurisdiction in equity to review, annul, modify or amend any rulings or orders of the commission which are unlawful to the extent only of such unlawfulness. The procedure before the said court shall be that rescribed by its rules, which shall state upon what terms the enforcement of the order shall be styled. The attorney for any party petitioning the supreme judicial court hereunder shall file with the clerk of the court a certificate that he is opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry, and that it is not intended for delay; and double costs shall be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay. *The burden of proof shall be upon the party adverse to the commission to show that its order is invalid.* Any proceeding in any court of this commonwealth directly affecting an order of the commission or to which the commission is a party shall have preference over all other civil proceedings pending in such court, except election cases."

(The italics are ours.)

NEW HAMPSHIRE.

There are two extremely well considered cases upon this subject decided by the Supreme Court of New Hampshire. They are *Grafton, etc. Co. vs. State,* 77 N. H., 490 (1915), and *Grafton, etc., Co. vs. State,* 100 *Atlantic* Rep., 668 (1917). These were two appeals in the same case. Both of the opinions were written by Mr. Chief Justice Parsons. The question was whether one public service company should be permitted to acquire the physical properties of two other companies and what the value of the properties was as the basis of an issue of securities. In the first case (77 N. H., 490), the Commission held that the price at which it was proposed to transfer and capitalize the properties was excessive and the Commision therefore refused to permit the transaction to be carried out.

The New Hampshire Supreme Court discussed the whole matter in a very able opinion, indicating to the Commission the principles which should govern its action and remanded the order. It should be particularly noted that the court had no opportunity to reverse the Commission on the question of the value of the property in the first appeal because as shown by the report of the case (p. 491) the Commission "did not report the maximum capitalization of the properties which would be approved."

The New Hampshire statute with respect to the effect to be given to the orders of the Commission is

as follows (Laws 1911, c. 164, s. 17 (d); Laws 1913, c. 145, s. 222):

> "The findings of the commission upon all questions of fact before it shall be deemed *prima facie* lawful and reasonable, and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied by a preponderance of the evidence before it that such order is unjust or unreasonable."

It will be observed that the New Hampshire statute is stronger, so far as supporting the order of the Commission is concerned, than the Pennsylvania statute. The Public Service Commission of New Hampshire, however, did not correctly follow the principles enunciated by the court on the first appeal. The result was the second appeal (100 Atl. Rep., 668), in which it appeared that the Commission found the fair value of the property in question to be $165,000, and dismissed the petition for an increase of capital stock beyond this amount. On this appeal, the Supreme Court of New Hampshire fully discussed and considered a number of the questions of fact which had been decided by the Commission; the *court itself* found the value of the property to be $245,000 and again recommitted the case to the Commission "for such further proceedings as justice may require in accordance with the foregoing findings and rulings."

These two opinions of the Supreme Court of New Hampshire contain such an excellent discussion of the law on this subject that we could hardly do justice to them without quoting the entire opinions of the court.

Among other things the court said (77 N. H., 490, pp. 504-505-506):

"The burden therefore rests with the appellants to satisfy the court that upon the evidence the findings are erroneous. The fact that they are merely *prima facie* disposes of the contention that they were intended to stand, like the findings of a jury, if supported by any evidence. The legislature plainly intended to submit to the appellate tribunal the validity upon the evidence of the commission's findings of the evidentiary facts upon which the justice and reasonableness of the order appealed from might depend. The term '*prima facie*' imports merely that there was evidence upon which the finding could be made. Webster Dict. Whether the finding should be made is the question upon appeal."

* * * * * * *

"One who has the burden of proof has the right as well as the duty to sustain it. The right is implied from the duty. When it is said that the plaintiff has the burden of proof, it is understood that he has the right to present the considerations upon which he relies and to invoke the judgment of the tribunal upon the issue. He is not thrown out of court if the tribunal think some reasonable men might find against him, but he prevails unless the tribunal themselves think he has not sustained the burden. The terms describing revisory power are familiar and simple. It might have been provided that the order appealed from should not be set aside if there was any evidence to sustain it, or unless it clearly appeared reasonable men could

not find it just and reasonable, or unless it could not reasonably be found just and reasonable. This, or similar language properly descriptive of the limited power which the state claims the statute intended to give the appellate tribunal, was not used, but, on the contrary, language usual in describing the action of a tribunal deciding issues of fact upon a preponderance of the evidence.

Giving to the language used its plain and ordinary signification, interpreting it as usually understood, there can be no escape from the conclusion that it is the conscience of the appellate tribunal which is invoked. The question is not whether the commission acted honestly, or whether there is or not some evidence to support their conclusion, or whether some reasonable men might think the order just and reasonable, but is the mind of the appellate tribunal satisfied with the degree of certainty required by the statute that the order is unjust or unreasonable. If the decision is one that can constitutionally be placed upon the court, the court cannot disregard the duty imposed. The requirement that the court must be satisfied by a clear preponderance of the evidence before it cannot be construed as prohibiting the court from weighing the evidence."

NEW JERSEY.

In *Public Service Gas Co. vs. Public Utility Commissioners,* 84 N. J. L., 463 (1913), the order of the Board of Public Utility Commissioners was sustained under the facts but the opinion of the New Jersey

Supreme Court emphatically supports our proposition. In that case, the court said (pp. 466-469):

> "The real controversy in the case arises upon the writ prosecuted by the gas company. Under section 38 we are given jurisdiction to set aside the orders of the commissioners when it clearly appears that there was no evidence before the board to support reasonably such order or that the same was without the jurisdiction of the board. On its face this section confers jurisdiction upon this court, but a jurisdiction of a limited character, only to be exercised when it clearly appears that there is no evidence before the board to support their order, or where the order is without their jurisdiction. *If this language is taken literally, we should be powerless in any case within the jurisdiction of the board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be.* It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature cannot limit us in the exercise of our ancient prerogative. That the legislature did not intend to do so is made clear by a consideration of the whole act. We are, by the express terms of section 38, authorized to set aside the order when it is without the jurisdiction of the board. The jurisdiction of the board to fix rates is by section 16c limited to cases where the existing rate is unjust, unreasonable, insufficient or unjustly discriminatory or

preferential. The only words important for the present case are unjust and unreasonable, since the commissioners themselves went no further in their adjudication. To determine then whether the commissioners had jurisdiction, we must first determine whether the existing rate was unjust and unreasonable, and *in determining that fact we are not limited to the question whether it clearly appears that there was no evidence before the board to support reasonably its order; section 16c does not purport to limit the scope of our inquiry into the fact, and we must therefore determine it in the usual way according to the whole of the evidence.* Indeed, section 38 itself makes a distinction between the evidence required to support the order, and that required to sustain the jurisdiction. In the former case the language literally construed would prevent setting aside the order unless there was an absence of any evidence to support it. In the latter case all that section 38 requires is that it should clearly appear that the order was without the jurisdiction of the board. When the legislature in section 38 required that the absence of jurisdiction should clearly appear, it probably had in mind the rule applicable when the court is dealing with the validity of the verdict of a jury upon a rule to show cause, or with the determination of commissioners of assessment as to the amount of special benefits, or the determination of the state board of taxation as to the valuation of property. In these cases there is a presumption in favor of the action of the inferior tribunal because in each case that tribunal is acting

in a judicial capacity and may fairly be supposed to preserve a judicial attitude. The same rule has been sometimes applied in rate cases, but with less reason.

The presumption in favor of the acts of a judicial or quasi-judicial tribunal does not apply with the same force to a legislative tribunal, nor to a tribunal which possesses not only to some extent the powers of a court but also to some extent the powers of a public prosecutor. A legislative body prescribing a rule for future conduct is not limited by the same considerations of justice as a tribunal required to do justice in accordance with existing rules; and one in the position of a public prosecutor can hardly be supposed to preserve a judicial frame of mind; he is rather in the position of one who is judge in his own cause. Under the Public Utilities act, the commissioners are given extensive powers of legislation and are given the power of initiating proceedings themselves. The manner in which these powers shall be exercised involves often a consideration of large questions of public policy or business wisdom. For example, in this very case the commissioners have fixed a rate for the Passaic district alone, to the exclusion of all other parts of the state in which the gas company by its charter may operate. Whether it is wise to segregate in this way a thickly settled territory in which gas may be manufactured in large quantity and distributed at comparatively small expenses, so as to give the inhabitants of the populous districts the advantage of their density of population, or whether it is wise

to determine the rate by a consideration of the facts throughout the territory served as a whole, so that the smaller towns may profit by the economies resulting from business on a large scale, and so that the charge for distribution through miles of pipe where consumers are few may be reduced by entering into an average with the cost of distribution through short lines of pipe where consumers are many, is a question of public or business policy, not a question of law or abstract justice to be tested by fixed rules. In such a case there may perhaps be a fair presumption that the action of the commissioners is dictated by wise policy but hardly that its action is just and reasonable. In addition, disobedience to the order of the Commission subjects to a penalty of $100 per day, and in some cases amounts to a misdemeanor, so that the public service company is entitled to the benefit of the ordinary rules that require penal and criminal statutes to be construed strictly. *All these considerations lead us to the conclusion that if there is any presumption in favor of the order of the commissioners, it depends, like the opinion of the court of another state, upon the strength of the reasoning by which it is supported.* This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body.

We must, therefore, determine for ourselves upon all the evidence whether the former rate for gas in the Passaic district was unjust and unreasonable, and whether the new rate is just and reasonable."

(The italics are ours.)

The Public Service Gas Co. case, 84 N. J. L., 463, *supra,* was affirmed by the Court of Errors and Appeals, on appeal from the Supreme Court in *Public Service Gas Co. vs. Board of Public Utility Commissioners,* 87 N. J. L., 581 (1914).

This case was brought before this court by a writ of error and on January 19, 1917, the writ was dismissed, with costs, per stipulation. See *Public Service Gas Co. vs. Board of Public Utility Commissioners,* 242 U. S., 666, (1917).

In *Erie R. R. Co. vs. Board of Public Utility Commissioners,* 85 N. J. L., 420 (1914), an order of the Board of Public Utility Commissioners, requiring certain railroads to furnish drinking water on certain passenger cars was reversed. In that case, the Supreme Court reversed the board on a pure question of fact.

The New Jersey Act which refers particularly to review by the court, or orders of the Board of Public Utilities Commission is the Act of 1911 (P. L. 1911, Section 38, c. 195, p. 374), the pertinent portion of which reads as follows:

> "* * * The Supreme Court is hereby given jurisdiction to review said order of the board and to set aside such order when it clearly appears that there was no evidence before the board to support reasonably such order or that the same was without the jurisdiction of the board. * * *"

NEW YORK.

In *People vs. Willcox*, 210 N. Y., 479 (1914), the Court of Appeals of New York sustained the Appellate Division which reversed a determination of the State Public Service Commission fixing gas rates in Brooklyn on the ground that the Commission had not made an "appreciable allowance" for going value in fixing the value of the property as the basis for rate making. In this case, the New York Court of Appeals said (p. 485):

> "The first question certified then resolves itself into two heads: 1, Is 'going value' a distinct item to be appraised and included in the base upon which the fair return is computed? 2. *Was the evidence in this case sufficient to justify an allowance for it?*"
>
> (The italics are ours.)

The court then proceeds to discuss and decide the question of fact upon the evidence.

In connection with the *Willcox case*, Section 2140 of the New York Code of Civil Procedure, which governs the matter of appeals from the Public Service Commission, is as follows:

> "The questions, involving the merits, to be determined by the court upon the hearing are the following, only:
>
> 1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
>
> 2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter,

has been pursued in the mode required by law, in order to authorize it or him to make the determination.

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence."

The *Willcox case* before the Appellate Division is *People vs. Willcox,* 156 App. Div. (N. Y.), 603 (1913) The order entered in theh Appellate Division is as follows (p. 618):

"Writ sustained and determination reversed, with fifty dollars costs and disbursements to relator, and matter remitted to Public Service Commission for action in accordance with opinion."

OKLAHOMA.

In *Pioneer Telephone & Telegraph Co. vs. Westenhaver,* 29 Okla., 429 (1911), the report of the case shows (p. 431) that the Corporation Commission of Oklahoma entered an order setting aside a rate in-

crease of the company and directed that the rates should be the same as those charged before the increase, namely, those charged prior to December 1, 1907. The Supreme Court of Oklahoma reversed this finding and entered an order (p. 460) setting aside the order of the Commission and directing that the new rates should be effective. In this case the court reversed the Commission on numerous findings of fact relating to the values of the property and other items and not only set aside the figures fixed by the Commission but substituted therefor figures *fixed by the court.* For example: the opinion shows (p. 448) that the Commission allowed no going value and that the court directed that 20% of the reproductive value, or $18,930.73, should be allowed for this item. It further appears (p. 452) that the Commission refused to make an allowance of any sum as a separate item for depreciation. On this point also the court reversed the Commission and ordered (p. 454) that 7% of the reproductive value should be allowed for annual depreciation amounting to $6,626.45. Another item as to which the Commission was reversed was an allowance of $2,000 per annum for general expense charged to the Enid Plant. With respect to the findings of the Commission on this item, the court said (pp. 450-451):

> "This finding is not supported by the evidence; and *if the Commission is in possession of facts upon which to base it they have not been certified to us.* * * * Had the Commission adopted any basis for apportioning this legitimate expense that appeared reasonable and fairly accurate, this court would not be disposed to disturb the finding arrived at thereby, for the finding upon this ques-

tion, in a large measure, involves matters of judgment; but the Commission abandoned the only basis of apportionment suggested by it, and, *so far as this record discloses, arbitrarily found the sum of $2,000.*"

(The italics are ours.)

It thus appears that the Supreme Court of Oklahoma felt entirely at liberty to reverse the Commission on questions of fact. The statute in Oklahoma governing the matter of appeals is the Constitution, Article 9, Sections 22 and 23 (Snyder's Ed., p. 259), which reads as follows:

Section 22:

"In no case of appeal from the Commission, shall any new or additional evidence be introduced in the Supreme Court; but the chairman of the Commission, under the seal of the Commission, shall certify to the Supreme Court all the facts upon whch the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence so introduced or considered as the Commission may deem proper to certify. Commissions shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered

by the Supreme Court, upon disposing of the appeal.

The Supreme Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising upon such appeal; *provided, however,* That the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal and require the same to be further investigated by the Commission and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided."

Section 23:

"Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges or the classifications of traffic of any transportation or transmission company, it shall at the same time substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversed order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the Commission at the time the original order appealed from was entered. The right of the Commission to prescribe and enforce rates, charges, classifications, rules and regulations affecting any or all actions of the Commis-

sion theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the Commission, prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive."

In *Western Union Telegraph Co. vs. State,* 31 Okla., 415 (1912), the Supreme Court again reversed the Corporation Commission of that State in a rate case on questions of fact.

Counsel for the defendants in error rely on *Steenerson vs. Great Northern Ry. Co.,* 69 Minn., 353 (1897), in which case the order of the Commission reduced the rates on grain on all lines of the Railway Company in the State. The District Court of Ramsey County reversed the order of the commission and in turn was reversed by the Supreme Court of Minnesota, which ordered a new trial (p. 409). The entire revenue of the Railway Company was not involved in that case. The case involved a statute which, as shown by the opinion (p. 376) the court held to be "somewhat vague and obscure." The court held that it had the alternative of so construing the statute as to put the court in place of the Commission (which would be unconstitutional) or to hold that the District Court might review the findings of the Commission in the same manner as an Appellate Court reviews the findings of a jury on a trial in the court below (p. 375). Believing that it faced this diffi-

culty, the court took the latter alternative. As to the conception of the duty of the court below entertained by the Supreme Court of Minnesota we call attention to the following significant language in the opinion (p. 376):

> "The district court can review the findings of the Commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand. *under the statute, the district court should in this case have determined to what extent the rates fixed by the commission should be modified,* so that *such rates would not be confiscatory,* just as an appellate court often determines how much an excessive verdict shall be cut down, so that it may stand for the balance, and a new trial be denied. *The court below held that it had no jurisdiction to determine to what extent the rates here in question should be thus modified, and in this it erred.*"
>
> (The italics are ours.)

After a careful examination of the authorities we have not found, nor do we believe there exists, either in Minnesota or in any other State in the Union, a case involving the entire revenue of a public service company in which it is held that the findings of a commission must be upheld if supported by substantial evidence, without regard to the weight of the evidence. There are Minnesota cases which use such language with respect to such legislative or administrative matters as establishing a station or making a switch connection at a crossing of another railroad, or making a track con-

nection between two railroads, etc., but it is not the law of Minnesota that in all cases a commission's findings must be upheld if supported by substantial evidence without regard to the weight of the evidence. For example, in *State ex rel. vs. Minneapolis & St. L. R. R. Co.,* 80 Minn. 191 (1900) the order of the commission required defendant railroad to build and maintain a station house at a small village. In that case the Supreme Court of Minnesota, in an opinion by Judge Mitchell, found the order of the Commission to be unreasonable under the facts presented and reversed the judgment of the court below, which had sustained the Commission's order. In *State ex rel. vs. Minneapolis & St. L. R. R. Co.,* 87 Minn., 195 (1902) the order of the Commission directed defendant railroad to build and maintain a depot at a village. This order was sustained by the court below and on appeal the judgment was affirmed because the Supreme Court of Minnesota was equally divided in opinion *in respect to the facts.* In *State vs. Great Northern Ry. Co.,* 123 Minn., 463 (1913) the order required defendant railroad to build and establish a depot with a suitable platform and a custodian in charge thereof. The order was sustained as reasonable by the District Court in Wilkins County and by the Supreme Court of Minnesota on appeal. The latter court discusses the evidence and shows (p. 466) that the railway company produced no evidence as to the expense of operating the building and of providing the custodian. The Supreme Court of Minnesota said (p. 467) that the question "as to what accommodations are reasonably necessary to afford proper transportation facilities to the public is legislative or administrative, and not judicial, in its nature;" * * * The case of

State vs. Great Northern R. R. Co., 130 Minn., 57 (1915) cited by the Supreme Court of Pennsylvania in its opinion in the case at bar (R., Vol. I, p. 114) involved the operation of Sunday trains and the order of the Commission requiring such operation was set aside by the District Court for Ramsey County and this action was affirmed by the Supreme Court of Minnesota on the ground that to operate the trains would be a violation of the Sunday Laws. With respect to the decision in *Steenerson vs. Great Northern R. R. Co.*, 69 Minn., 353, *supra*, we point out not only the more recent decisions to which we have referred above, but that since that case the Minnesota statute has been radically changed so as to be in line with most of the other State statutes on the subject. Section 4192 of the General Statutes of Minnesota of 1913, dealing with appeals from the orders of the Commission, uses the following language:

> "Such findings of fact shall be *prima facie* evidence of the matters therein stated, and the order shall be *prima facie* reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If said court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable it shall be vacated and set aside."

Further, in *Brogger vs. Chicago, St. Paul, M. & O. Ry. Co.*, 137 Minn., 338 (1917) the Commission's order required defendant railroad to establish and maintain a passenger depot and ticket office in the village of Butterfield and further provided (p. 345) that trains re-

quired to stop at the old depot should also stop at the union station on flag. The Supreme Court of Minnesota held that both stops could not reasonably be required and consequently modified the judgment of the District Court which had sustained this Commission's order. In the *Brogger case* the above quoted section 4192 of the general statutes of Minnesota of 1913 was considered and the Supreme Court of Minnesota discussed the evidence in the case at considerable length.

Counsel for the defendants in error also rely on the following cases:

Minneapolis, St. P., & S. S. M. R. Co. vs. Railroad Commission, 136 Wis. 146 (1908);

Public Service Commission vs. Northern Central Ry., 122 Md., 355 (1914);

Grand Rapids & I. Ry. Co. vs. Michigan R. R. Commission, 188 Mich., 108 (1915);

City of Norwalk vs. Conn. Co., 89 Conn., 537 (1915);

West Jersey & S. S. R. R. Co. vs. Public Utility Commissioners, 87 N. J. L. Rep. 170 (1915).

An examination of these cases shows that there is nothing in any of them inconsistent with the view we have expressed. In *Minneapolis, St. P. & S. S. M. R. Co. vs. Railroad Commission,* 136 Wis. 146, *supra,* the order of the Commission directed the defendant railroad to erect and construct at a point on its line a platform suitable for the loading and unloading of merchandise. In that case not only was the question involved legislatve in

character, but the opinion shows (p. 158) that the Wisconsin statute provides that

> "In all trials under this section the burden of proof shall be upon the plaintiff to show by *clear and satisfactory evidence* that the order of the Commission complained of is unlawful or unreasonable, as the case may be."
>
> (The italics are ours.)

In view of the language of the statute the Supreme Court of Wisconsin said further (pp. 165-167):

> "Unless the plaintiff is able to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be, the order must stand. *The words 'clear and satisfactory evidence' are significant, because at the time of the enactment of this statute they were used in the law of this State to describe a degree of proof greater than a preponderance of evidence and such as was necessary in order to establish fraud by that party to an action upon whom the burden of proof rested.* • • • We are not able to uphold the contention of the learned attorney general, made in his first brief, to the effect that this court cannot review the order of the commissioners unless the order is confiscatory in its character and effect, and that unlawful and unreasonable in this statute mean confiscatory, because it seems to us that this statute authorizing a review by the court is valid and imposes upon the court duties which it may not disregard. Indeed, the constitution of the State seems to forbid any other interpretation. Art. VII, Sec. 8. This court therefore maintains its

right and duty to review the orders of the Commission to the extent authorized by this statute as here construed. By the construction here given to the law, considering the degree of proof required and the viewpoint of the investigation by the court and that the court is dealing with a question of fact, or a mixed question of fact and law (*Morgan's La. & T. R. & S. S. Co. vs. Railroad Comm.*, 109 La., 247, 33 South., 214), great weight is necessarily given to the orders of the Commission." (The italics are ours.)

In *Public Service Commission vs. Northern Central Ry.*, 122 Md., 355, *supra*, the Court of Appeals of Maryland sustained a decision of the trial court which reversed, in part, an order of the Public Service Commission of Maryland fixing certain rates for services, on the ground that it was unreasonable. The Court of Appeals fully discussed and considered this question on the evidence and then decided the question of fact against the Commission. The decision therefore is in favor of our contention.

With respect to the provisions of the Maryland statute the language of the court is as follows, p. 392:

"The Maryland statute confers upon the Commission broad powers and discretion, and while it requires the Court, upon application to it, to determine whether the rates fixed by the Commission are unreasonable or unlawful, it declares that the Commission's order shall not be disturbed except upon *clear and satisfactory evidence* that it is unreasonable or unlawful. Where the evidence pro-

duced by the party alleging the unreasonableness of the order is not of such a character, the court is without power to enjoin its execution."

(The italics are ours.)

In the subsequent case of *Northern Central Ry. Co. vs. Laird,* 124 Md., 141 (1914), the Court of Appeals of Maryland reversed an order of the trial court which had sustained an order of the Public Service Commission governing the movement of trains. The court fully discussed the evidence and reached a conclusion contrary to the finding of the commission.

In *Grand Rapids & I. Ry. Co. vs. Mich. R. R. Comm., supra,* 188 Mich., 108 (1915), the Commission by order required the railway company to establish a through route with joint rates for passengers and baggage from Kalamazoo to Charlevoix. The order was legislative in character and was sustained as reasonable. In that case the Supreme Court of Michigan said (p. 112):

"The question was one of fact, and the testimony before the Commission was *sufficient* to support the conclusion reached. If the conclusion arrived at by the Commission finds *justification* in the testimony, this court will not substitute its judgment for that of the commission."

(The italics are ours.)

This is a very different thing from saying that an order will be sustained if there is *any evidence* to support it. In the case at bar we maintain and the Superior Court held that the order of the Commission *was not justified* by the testimony.

In *City of Norwalk vs. Conn. Co.,* 89 Conn., 537 (1915), the question involved was an order of the Public Utilities Commission providing for (1) the number of tracks across a bridge, (2) the kind of rails, and (3) the payment by a Street Railway Comany of a portion of the cost of the bridge. The court held that the first two questions were purely *administrative* and not properly the subject of appeal on the record. As to these administrative questions, the court said (p. 542):

> "If an administrative order be so unreasonable as to justify judicial interference, it is within our judicial power, on proper appeal, to set it aside. *Norton vs. Shore Line Electric Ry. Co.,* 84 Conn., 24, 78 Atl., 587. It is apparent from the finding and order of the Commission, that the decision as to the kind of rails and number of tracks was made upon evidence submitted to the Commission and after hearing regularly had. It is clear that the Commission did not act without evidence; *there is nothing to indicate that it plainly decided contrary to the evidence.* The issue as to the number of tracks was dependent upon a variety of considerations and was decided upon a conflict of evidence. In such a situation, it is quite immaterial that the trial court arrived at another conclusion from the facts surrounding this question, and it would be equally immaterial if we entertained another view. The question was *administrative;* it was decided, after hearing, upon a conflict of the evidence."
>
> (The italics are ours.)

In *West Jersey & S. S. Ry. Co. vs. Public Service Commission,* 87 N. J. Law Rep., 170, *supra,* the question involved was the approval by the Board of Public Utility Commissioners of a lease of the railroad proposed to be made to the Pennsylvania Railroad Company. The court in that case, speaking by Mr. Justice Gummere, said, with respect to the order of the Board of Public Utility Commissioners (p. 178):

> "* * * If it shall be made to appear to the court that such case is purely arbitrary or that it has no reasonable basis upon which to rest, *or is unsupported by the facts laid before the board,* the court may declare it null and void, and order it to be set aside."
>
> (The italics are ours.)

The question in this New Jersey case was of an administrative character, being whether one railroad should be leased to another.

Counsel for the defendants in error also rely upon certain decisions of the Superior Court of Pennsylvania, but an examination of these decisions shows that there is nothing whatever in any of them contrary to the views we have expressed:

Mount Union Borough vs. Mount Union Water Co., 63 Pa. Superior Ct., 337 (1916). In that case the court approved water rates fixed by the Commission. Judge Head, writing the opinion of the Superior Court, said (p. 343) "that the findings of the Commission in this respect were supported by the preponderance of the evidence produced."

P. R. R. Co. vs. Public Service Commission, 67 Pa. Superior Court, 575 (1917). In that case the question was purely legislative, namely, the character of the rear exit of the rear car of a train.

Buffalo & L. E. Trac. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 581 (1917). The question in that case was purely legislative, namely, whether an order of the Commission refusing to approve an admittedly dangerous grade crossing should be sustained. The court said (p. 584) that the appellant had not sustained the burden of proof to show the order unreasonable.

In *West Virginia Pulp & Paper Co. vs. Public Service Commission,* 65 Pa. Superior Ct., 5 (1916), the Commission had refused to restrain a railroad company from increasing a freight rate on shipments of pulp wood to the mills of the plaintiff at different places in Pennsylvania. This order was sustained. The Superior Court reviewed the evidence and stated (p. 9) that it was unable to find substantial grounds on which to rest a conclusion that the order of the Commission was so manifestly unreasonable as to justify its reversal. Judge Henderson, delivering the opinion of the Superior Court, said (p. 8):

> "The sufficiency of the proof must be left in a large degree to the sound judgment of the Commission and where that judgment has been exercised on competent and relevant evidence the conclusion ought not to be disturbed by judicial interference unless it is made clearly to appear that it is unreasonable or not in conformity with law."

In *B. & O. R. R. Co. vs. Public Service Commission*, 66 Pa. Superior Ct., 403 (1917), the court (p. 413) reversed the order and remitted the record in order that the Commission should place upon the record facts found upon the evidence which would enable the Superior Court to determine whether the conclusion of the Commission was reasonable and in conformity with law.

HEADING IV.

THE COMMISSION PLACED TOO LOW A VALUE UPON THE PROPERTY OF THE WATER COMPANY.

With the permission of the court we will assume, for the present, that, under the decisions of this court, in a case where it is claimed that a Federal right has been denied, this court will not be bound by the findings of any court or commission where the findings are either—

1. **Conclusions of law, or**
2. **Findings of fact without any evidence to support them, or**
3. **Findings in which a conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.**

(The decisions of this court to this effect are set forth *infra*, pp. 290-301.)

Making the foregoing assumption we will proceed to discuss the five elements of value which were directed by the Superior Court of Pennsylvania to be added to the value of the property of the Water Company as fixed by the Public Service Commission. These five elements of value are the following:

Additional interest during construction,	$28,601.33
Going value,	185,000.00
Added value of Neville Island real estate,	51,200.00
Added value of Monongahela Water Company parallel lines,	42,661.00
Brokerage or discount on securities,	92,415.47
Total	$399,877.80

Of these in their order:

SUBDIVISION 1.

THE COMMISSION ERRED IN NOT ALLOWING A SUFFICIENT AMOUNT FOR INTEREST DURING CONSTRUCTION.

When a plant of a public service company is under construction, the various sums invested, from time to time, will necessarily lie idle and be unproductive until the plant is completed. For the respective periods during which these sums lie idle interest should be allowed thereon as a capital charge, because such interest is just as much part of the expense of construction as if

it were an expenditure for physical property. The interest thus allowed is commonly designated "interest during construction." It is so universally allowed as a proper capital charge that we will not weary the court by citing the numerous cases in which such allowance has been made. It was treated as proper capital charge by the witnesses for both the plaintiff and defendants in error in this case and by the Public Service Commission. (It should be noted in passing that interest during construction has nothing whatever to do with going value.)

We will merely refer to three of the recent cases as illustrating the mannner in which this allowance is made.

In *Re Central Pacific Railway Company,* P. U. R. 1916 B 845 (California Railroad Commission). Valuation for general purposes. 6¼ per cent. of reproduction cost or 5 per cent. interest for ½ of the construction period was allowed for interest during construction (p. 884).

Re: *Potomac Electric Power Company,* P. U. R. 1917 D 563 (District of Columbia, Public Utilities Commission). Valuation for general purposes. 7 per cent. of base cost was allowed for interest during construction (p. 657).

Re: *Atchison, Topeka & Santa Fe Railway Company,* P. U. R. 1917 F 272 (Kansas Public Utilities Commission). Rate case. 6 per cent. interest during the average construction period was allowed for interest during construction (p. 287).

Many other cases could be added to the foregoing.

We respectfully submit that the Commission committed plain and palpable error in not allowing a *sufficient* amount for this item. The Commission arbitrarily and in the teeth of the evidence determined that the construction period would be only 18 months instead of 2½ years (R., Vol. I, p. 66 and p. 61—Original, p. 125—line 21 and last line on schedule). *We respectfully request your Honors particularly to note that the engineers for both the plaintiff and defendants in error agreed that the construction period would be* 2½ *years* as shown by the note upon Exhibit "R" (R., Vol. II, p. 1113): "Interest during Construction has been computed as per Engineers' Agreement, Construction Period being taken at 2½ years for lands and 2 years and less for plant." Interest for 2½ years at 6 per cent. per annum would be 15 per cent. and the reason this percentage was taken on lands was that the investment in real estate would be the first investment made. But the engineers did not allow the full 15 per cent. on all the items of expenditure in constructing the plant. On the contrary, as shown by Exhibit "R" (R., Vol. II, pp. 1110 and 1112), Mr. Chester, the engineer for plaintiff in error, allowed 15 per cent. on $323,533 representing lands; 6 per cent. on $912,619 representing transmission system, water supply, reservoirs, stand pipe, etc.; and 3 per cent. on $160,529 representing buildings, machinery, equipment, etc. This same agreement as to percentages appears also by the testimony of Mr. Gannett, the engineer for defendants in error (R., Vol. II, p. 609), who allowed 15 per cent. on lands (amount not stated) and organization cost; 6 per cent. on $792,213; and 3 per cent. on $279,068. Inasmuch as

the engineers on both sides could not agree as to the cost of the property, they were unable to agree as to the amount in dollars and cents to be allowed for interest during construction. *But their agreement as to the length of the construction period, viz., 2½ years and as to percentages was complete and absolute.* In the paper book, or brief, filed by counsel for the Public Service Commission in this case in the Superior Court and in the Supreme Court of Pennsylvania it was specifically admitted (on pages 25 and 26 thereof) that the engineers for both sides had agreed that it would take two and one-half years to construct the property of the Water Company. The Superior Court, therefore, very properly set aside this arbitrary action of the Commission. Upon this point, the Superior Court said (R., Vol. I, p. 104):

> "Those who have practical knowledge as to the time necessary to construct a plant of the magnitude of the one under consideration, are properly qualified, and perhaps in a better position to determine the time, than lawyers or judges without practical experience. The engineers agreed that two and one-half years was a reasonable time, and this agreement should have been accepted, unless the Commission had other information or other evidence from which to curtail that time. The appellant was entitled to the additional year's interest at the rate found by the Commission."

There was no dispute whatever between the parties in this case as to the fact that the construction period would cover 2½ years. Nevertheless the Commission disregarded the agreement made by the engineers for both sides and, without evidence arbitrarily fixed the construction period at only 1½ years.

In *Pioneer Telephone & Telegraph Co. vs. Westenhaver et al.*, 29 Okla., 429 (1911), the Corporation Commission of Oklahoma set aside a rate increase and the Supreme Court of Oklahoma reversed the order of the Commission. Speaking of an item as to which the Commission was reversed, the Supreme Court of Oklahoma said (pp. 450-451):

> "This finding is not supported by the evidence and *if the Commission is in possession of facts upon which to base it they have not been certified to us.* * * * Had the Commission adopted any basis for apportioning this legitimate expense that appeared reasonable and fairly accurate, this court would not be disposed to disturb the finding arrived at thereby, for the finding upon this question, in a large measure, involves matters of judgment; but the Commission abandoned the only basis of apportionment suggested by it, and, *so far as this record discloses, arbitrarily found the sum of* $2,000."
>
> (The italics are ours.)

The treatment of this matter by the Supreme Court of Pennsylvania shows an entire failure to grasp the situation. That court used the following language (R., Vol. I, p. 120):

> "From the evidence before it, the Commission concluded that an allowance of interest for a period of one and one-half years would be sufficient. This was a matter of judgment to be exercised upon consideration of the facts. The plant was built to serve a number of communities, and would naturally be ready for use in part, at different periods of time. Under proper management the plant

would be earning money on some of its divisions long before they were all entirely completed. We cannot say that the conclusion reached by the Commission in this respect was unreasonable, or that it was not in conformity with law."

But this is no answer at all. We have already pointed out that the engineers for both sides clearly made allowance for the fact that the money would not all be invested for the full period of 2½ years, but that it would be invested for periods some long and some short, depending upon the time of completion and, therefore, made some allowances of interest amounting to 6 per cent. (which would cover only one year) and some as low as 3 per cent. (which would cover only six months).

We respectfully submit, therefore, that the Commission's findings as to interest during construction is not only not supported by any evidence but is directly contrary to all the evidence in the case and contrary to the agreement of the engineers for both sides. The same thing applies to the treatment of this question by the Supreme Court of Pennsylvania.

For interest during construction the Commission allowed $42,902 (R., Vol. I, p. 66 and p. 61—Original, 125, last column, Item 21). This, as shown, was on the basis of a construction period of only 1½ years. If the construction period is taken as covering 2½ years, this means that an additional year's interest should be allowed which would amount to two-thirds of $42,902 or $28,601.33.

HEADING IV. (*Ante*, P. 209).

SUBDIVISION 2.

THE COMMISSION ERRED IN NOT ALLOWING GOING VALUE.

As we will show hereafter, the Commission allowed nothing for going value. The Superior Court allowed $185,000.

(a) *What is going value?*

Suppose the plants of two water companies are identical in construction and size, and equally well located. One plant has just been completed and is ready for operation but does not possess a single customer. The other has been in operation a sufficient time to acquire a large number of customers and possesses a well developed business. No one can doubt that the second plant is worth more than the first. The difference is due to the fact that the second plant has acquired what is known as "going value." Going value is the value of a created income.

In *Des Moines Gas Co. vs. City of Des Moines*, 238 U. S., 153, also a rate case (1914), this court, speaking by Mr. Justice Day, discusses going value as follows (p. 165):

> "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self

evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

In his dissenting report, Commissioner Rilling defines going value as follows (R., Vol. I, pp. 74-75):

"By going concern value we understand that value which a company has by reason of its being a going, active concern serving the purpose for which it was intended in a proper and efficient manner with a sufficient number of patrons and amount of business acquired so that the capacity and the property of the company are to a reasonable degree employed or engaged. Surely there is a marked difference betwen such a company and one whose plant has either been newly constructed or having been previously constructed is not serving the purpose for which it was intended, has neither patrons nor business, and therefore consists only in the naked plant ready to start but with no business to carry on."

We respectfully refer your Honors to the excellent discussion of going value in Commissioner Rilling's dissenting report (R., Vol. I, pp. 74-76) and in the opinion of the Superior Court of Pennsylvania (R., Vol. I, pp. 102-104).

(b) *Does going value actually exist in this case?*

That a large amount should be allowed for going value in the case at bar is clear. The property of the

Water Company is situate in a thriving community in which the company and its predecessors, during the last twenty years, have developed the business to such an extent that the company now supplies some 9,000 separate families with water for domestic purposes. The Commission finds (R., Vol. I, p. 16), that the company's plant is reasonably well planned, is constructed in a substantial manner and is efficiently serving the public. It is conceded that the company furnishes an ample supply of pure water. *It is the uncontradicted evidence in the case that the property has a large going value.* Mr. Chester, an engineer called by the Water Company, fixed the going value at $225,000 (R., Vol. II, p. 708). Mr. Knowles, another engineer called by the Water Company, fixed the going value at $185,000 (R., Vol. II, p. 846). Mr. Gannett, one of the engineers called by the defendants in error, testified (R., Vol. II, p. 619), in substance, that he did not wish to estimate the going value of the property. Mr. Hudson, another witness called by the defendants in error, admitted (R., Vol. II, p. 639) that the property has a good going value now. Not a single witness called by the defendants in error attempted to deny the fact that the property of the company possesses a large going value. It is true that Mr. Hudson endeavored to draw the *legal conclusion* that the Water Company is not entitled to going value because he claims it has actually accumulated a surplus of $152,783.96. This surplus, however, never had any existence except in Mr. Hudson's imagination. This alleged surplus is shown in the statement of Audits and Estimates in the report of the Commission (R., Vol. I, p. 32—Original, p. 63, Columns F. & H, line 27), as if it were a statement made by all three

engineers for the defendants in error. The court should observe, however, that the Commission is in error in stating that all three engineers of the defendants in error made this estimate of surplus. The fact is it rests solely upon the testimony of the witness Mr. Hudson (R., Vol. II, pp. 634, 643-645). The sheet showing this alleged surplus (Exhibit 24—R., Vol. II, p. 1008—Original, p. 1807 a) was also made and submitted by Mr. Hudson. Mr. Hudson's testimony can only be characterized as preposterous. The way he arrived at this extraordinary result was to take the Willison audit, made by a witness for the defendants in error, showing the cost of the property, to be correct, to allow 6 per cent. as a fair return on capital engaged in a business of this character, to eliminate all depreciation charges whatever, except for the years 1912 and 1913 (R., Vol. II, pp. 643-645), and to allow nothing whatever for the purchase of the Monongahela Water Company stock (R., Vol. II, pp. 633-634). Let us examine Mr. Hudson's premises for a moment. The Willison audit shows the cost of the property less depreciation, to be only $765,560.62 (R., Vol. I, p. 32—Original, p. 61, Column B), whereas, even the Commission fixes the cost, less depreciation, at $783,194 (R., Vol. I, p. 60). Mr. Hudson says 6 per cent. is a fair return on capital, whereas, even the Commission says 7 per cent. Mr. Hudson testified, in substance (R., Vol. II, p. 644) that reasonable depreciation should have been allowed but that he proposes to amortize such depreciation in a future depreciation reserve. Mr. Knowles, one of the engineers of plaintiff in error, testified (R., Vol. II, p. 846) to what is most evident, namely, that depreciation should be charged every year. For the

Monongahela Water Company stock the Ohio Valley Water Company, on May 6, 1913, paid $292,450 as follows: $100,000 in notes of the Ohio Valley Water Company and $192,500 in par value of the stock of the latter (R., Vol. I, p. 55). For this investment Mr. Hudson does not allow a single dollar. We submit that every single premise upon which Mr. Hudson based his conclusion is unsound and that his conclusion is of no value whatever. Mr. Chester testified (R., Vol. II, pp. 713-715) that there is no surplus but, on the contrary, a large deficit. With respect to Mr. Hudson's imaginary surplus, the Superior Court of Pennsylvania very properly said (R., Vol. I, p. 104):

> "We are not impressed with the table of theoretical surplus. As a matter of fact, there was no surplus. The table might be useful in showing what the earnings should have been had a proper return been made. It might thereby assist in determining going value. The Commission did not consider it and we need not."

The Superior Court also said (R., Vol. I, p. 103): "There is no evidence of bad management in operation nor is there any evidence that there was a surplus accumulated."

In Lincoln Gas & Electric Light Co. vs. City of Lincoln, 39 Supreme Ct. Rep., 454 (decided June 2, 1919), this court, speaking by Mr. Justice Pitney, said (p. 457):

> "Again, we question the propriety of the master's treatment of 'going value,' which he seems to have estimated at less than otherwise he would have placed it upon the theory that the com-

pany's business had been developed, at the expense of the public, in the expenditure of past earnings exceeding a fair return upon the capital invested, and this without any finding, or any clear evidence to which our attention has been called, that past earnings were excessive."

Even if this imaginary surplus testified to by Mr. Hudson existed, we submit this would be no reason for denying the plaintiff in error the going value of its property.

On the question of the existence of going value, in the case at bar, Commissioner Rilling, in his dissenting report, said (R., Vol. I, p. 75):

"The Ohio Valley Water Company was organized in 1904 and engaged in the business for which it was incorporated under conditions then existing. It took its chances with success or failure, the same as any other concern. It has succeeded. After more than thirteen years of operation it is serving the public in the several municipalities named in its charter in an efficient manner, has an established business with a large number of patrons earning a return upon its capital investment, and as such a going concern we think it has a value over and above that value which it would have as a naked plant without any business."

(c) *Is going value commonly allowed?*

Going value is everywhere allowed. In *City and County of Denver et al. vs. Denver Union Water Com-*

pany, 246 U. S., 178, also a rate case (Opinion by Mr. Justice Pitney, March 4, 1918), which is the last decision of this court we have found on the subject, there was included in a total valuation of $13,415,899 the sum of $800,000 for "going concern" value. Some of the other recent cases are the following:

Newburyport Water Co. vs. City of Newburyport, 168 Mass., 541 (1897). In this case $40,000 was allowed for going value (p. 545).

Spring Valley Waterworks vs. City and County of San Francisco, 124 Fed., 574 (C. C., N. D. Cal., 1903).

This was a rate making case (p. 595) in which an allowance for going value seems to have been made to the extent of $1,400,000 (p. 596).

The Galena Water Co. vs. The City of Galena, 74 Kan., 644 (1906).

In this case going value to the extent of 25 per cent. of the physical valuation was allowed (p. 646).

C. H. Venner Co. vs. Urbana Waterworks, 174 Fed., 348 (C. C., S. D. Ohio, 1909).

In this case where the question was as to the reasonableness of water rates, the court having found the reproduction cost of the plant to be $155,000 added thereto the sum of $25,000 (about 16 per cent. of the reproduction cost) as going value (p. 352), making $180,000 in all.

City of Knoxville vs. Knoxville Water Co., 212 U. S., 1 (1909).

In this case $60,000 (about 10 per cent.) had been added by the court below to the tangible assets as going value (p. 9). This court did not pass on the propriety of including this item, as it was not necessary to do so in order to dispose of the case.

Gloucester Water Supply Co. vs. City of Gloucester, 179 Mass., 365 (1901).

13 per cent. of the physical valuation was allowed for going value.

City of Omaha vs. Omaha Water Co., 218 U. S., 180 (1910).

In this case the total valuation of the water company's property was $6,263,295.49, of which $562,712.45 was allowed as going value (p. 202).

Des Moines Water Co. vs. City of Des Moines, 192 Fed., 193 (C. C., S. D. Ia., C. D., 1911).

In this case, which involved the making of water rates, the court approved the report of George F. Herring, Master, allowing $168,277 as going value in a total valuation of $1,854,225 (or about 10 per cent. of the physical valuation).

Pioneer Telephone & Telegraph Co. vs. Westenhaver et al., 29 Okla., 429 (1911).

In this case going value was allowed to the extent of 20 per cent. of the physical valuation (p. 361).

Public Service Gas Co. vs. Board of Public Utility Commissioners, 84 N. J. L., 463 (1913).

The court affirms an order of the Public Utility Commission in a rate case allowing $1,025,000 (or 30 per cent. of the physical cost of the Paterson gas plant) "for going value or cost of developing the business" (p. 479). The opinion contains a good discussion of the question.

People vs. Willcox, 210 N. Y., 479 (1914).

The court affirmed an order reversing a ruling of the Public Service Commission because it made no allowance for going value in determining the value of the property of a lighting company. The opinion contains a good discussion of methods of determining going value.

Des Moines Gas Co. vs. City of Des Moines, 238 U. S., 153 (1915).

In this case this court says (p. 165) that going value is a property right, to be considered in determining the value of a gas company's property, but holds that under the peculiar facts of the case in question the master sufficiently included this element in his valuation without making an allowance therefor as a separate item. The court below, whose decision was affirmed by this court, was of the opinion (p. 209) that the mas-

ter had included in his valuation of $2,240,928, which was approved, a sum of $300,000 as going value. On this question as to the construction of the master's report, however, this court differed with the court below.

City of Beloit vs. Beloit Water, Gas & Electric Co., P. U. R., 1915, B-1005 (Wisconsin Railroad Com., April, 1915).

Rate case. Valuation $402,000. $20,000 allowed for development cost.

Seattle vs. Seattle Lighting Co., P. U. R., 1915, B-135 (Wash. Public Service Commission, February, 1915).

Rate case. Value $9,126,883. $1,594,096 was allowed for development cost.

Leavenworth vs. Leavenworth City & Fort Leavenworth Water Co., P. U. R., 1915, B-611 (Kan. Public Utilities Commission, January, 1915).

Rate case. Ascertained value about $500,000. 7½ per cent. allowed for going value.

Municipal League of Pheonix vs. Pacific Gas & Electric Co., P. U. R., 1915, F-1031 (note) (Ariz. Corp. Com., January 26, 1915).

Rate case. Value $979,779. $68,582 allowed for going value.

Oshkosh Water Works Co. vs. Railroad Commis-

sion, P. U. R., 1915, D-336 (Wis. Supreme Court, June, 1915).

Municipal purchase. Present value, $525,000. $54,000 or $68,000 allowed for going value.

In *re Peru Heating Co.,* P. U. R., 1915, E-502 (Indiana Public Service Commission, August, 1915).

Rate case. Plant value, $42,454. $7,546 allowed for going value and working capital.

Terre Haute Commercial Club vs. Terre Haute Waterworks Co., P. U. R., 1916, B-180 (Indiana Public Service Commission, December, 1915).

Rate case. Valuation of $1,200,000 includes going value of $80,000.

W. H. Peck et al. vs. Indianapolis Light & Heat Co., P. U. R., 1916, B-445 (Indiana Public Service Commission, July, 1915).

Rate case. $400,000 was allowed for going value of electrical utility having 30,000 customers. Annual gross revenue nearly $1,500,000, had paid substantial dividends for a number of years and would cost $4,852,777 to reproduce, less depreciation, exclusive of going value, although early losses had been recouped.

In *re Falls Light & Power Co.,* P. U. R., 1916, D-151 (Wisconsin Railroad Commission, March, 1916).

Municipal purchase. Compensation $17,500. Going value ought not to be less than $1,500 nor more than $2,000.

In *re Indianapolis Telephone Co.*, P. U. R., 1916, D-507 (Indiana Public Service Commission, March, 1916).

Merger. 8 per cent. allowed for going value in merger valuation of telephone company.

Arvada vs. Arvada Electric Co., case No. 42, April 27, 1916.

The Colorado Commission's engineer in an electrical rate valuation added to the physical property of the company 10 per cent. to cover cost of developing business and its going value.

In *re Cincinnati Gas & Electric Co.*, P. U. R., 1916, F-416 (Ohio Public Utilities Commission, September, 1916).

Rate case. Present value $7,161,426.30. Cost of attaching business, $375,000.

Commercial Club of Terre Haute vs. Citizens Gas & Fuel Company, P. U. R., 1916, E-1 (Indiana Public Service Commission).

Rate case. 8 per cent. of the value of the tangible property was allowed as going value.

In *re Richmond Light, Heat & Power Co.*, P. U. R.,

1917, B-300 (Indiana Public Service Commission, September, 1916). Rate case. $35,000 allowed for going value, $10,000 for working capital, making total property used and useful for convenience of the public, $450,000.

George H. Briggs et al. vs. Peaks Island Corporation, P. U. R., 1917, E-750 (Maine Public Utilities Commission).

Rate case involving a water company. $10,872 was allowed for going value (p. 756). $104,863.37 total valuation, including going value (p. 759).

Re Michigan State Telephone Company, P. U. R., 1918, C-81 (Michigan Railroad Commission).

Rate case. $835,215 allowed for cost of establishing business (p. 97). $10,913,191 total valuation, including cost of establishing business (p. 99).

Re United Fuel Gas Company, P. U. R., 1918, C-193 (West Virginia Public Service Commission).

Rate case. The value of the property was obtained by adding to the value of the physical property 10 per cent. for overhead costs (p. 221) and, upon this total value, 10 per cent. additional was allowed for going value (p. 224).

Many other cases could be added to the list, but we believe the foregoing are sufficient to show the manner and extent to which going value is commonly allowed.

(d) *Did the Public Service Commission allow going value in this case?*

It did not allow a single dollar for going value. We say this for these reasons:

(1) The Commission has never stated, either in its original report or in its report on petition for rehearing, that it made any allowance whatever for going value.

(2) Commissioner Rilling, *who wrote the majority* report, subsequently filed a dissenting report, *one of the grounds of his dissent being that the Commission did not allow going value.* Commissioner Rilling said in his dissenting report (R., Vol. I, p. 74):

> "We are also of the opinion that the respondent should be allowed for the going concern value of its property,"

and he then enters upon a clear and accurate discussion of this question. Mr. Rilling explains that the majority report reflects the judgment of his associates, but not his own, and his reason for his dissenting report in the following language (R., Vol. I, p. 73):

> "The report of the Commission in this case in so far as its conclusions as to the fair valuation of respondent's property and the amount of fair return allowed thereon are concerned, reflects the judgment of my associates of the Commission, but in which I did not concur. As to all other matters in said report it meets my approval. Having prepared said report to express the best judgment of the Commission as a whole, which was arrived at

after careful consideration thereof, and the Commission now having by its reply to the respondent's petition for a rehearing set forth at length some of the reasons for its conclusions, I deem it proper to also set forth in a separate reply my reasons for not concurring therein."

If any one knows what the majority report of the Commission contains, surely Mr. Rilling, the man who wrote it, knows. Can anyone doubt we are right in claiming that no going value was allowed when the Commissioner who wrote the majority report distinctly states that it was not allowed and the other members of the Commission significantly fail to state that it was allowed?

(3) The Superior Court of Pennsylvania expressly found that the Commission did not allow going value. The Superior Court said (R., Vol. I, p. 102):

"The Commission declined to allow any sum for going concern cost or value."

and again (R., Vol. I, p. 103):

"The appellant would have been entitled to a return on the value as adopted by the Commission if it had just completed its construction and was ready to start business."

(4) The Commission's report plainly indicates that nothing was allowed for going value.

Referring to reason No. (4) above, in its report on petition for rehearing (R., Vol. I, p. 60)—Original, p. 125), the various items making up the reproduction cost as found by the Commission are set forth and noth-

ing whatever is included for going value. In its said report (R., Vol. I, p. 68), the Commission expressly declined to allow any amount of going value in figuring the reproduction cost, but stated, in substance, that due *consideration* would be given to the item in determining the fair value of the property. One would naturally expect, therefore, that the fair value, which ought to include going value, would exceed the reproduction cost from which this item was expressly excluded. *The remarkable fact, however, is that the Commission fixed the fair value at some* $70,000 *less than the reproduction cost less depreciation, although, as stated, it allowed nothing for going value in reproduction cost.* (The record shows (Vol. I, p. 68 & p. 61—Original, p. 125) that the Commission found the reproduction cost new of the property as of September 30, 1915, to be $1,083,825, from which it deducts accrued depreciation of $88,061, leaving the net reproduction cost new, less depreciation, $995,164. The record also shows (Vol. I, p. 40) that the Commission found the fair value of the property, less depreciation, to be $924,744). In *State Journal Printing Co. vs. Madison Gas & Electric Co.*, 4 Wis. R. R. Commission Rep., 501 (1910), also a rate case, the Wisconsin Commission said (p. 579):

> "• • • the cost of reproduction of a plant usually plays perhaps the most important part in determining its value," • • •

If the plant of the Ohio Valley Water Company were not well planned, well constructed and efficient, there might be some justification for fixing the fair value at less than reproduction cost, as no one would wish to reproduce such a plant. But how can the Commission's finding be justified in view of the following finding of

fact made by the Commission with respect to the character of the property of the company (R., Vol. I, p. 16):

> *"The plant of the Ohio Valley Water Company was reasonably well planned and constructed in a substantial manner, and is now efficiently serving the public."*
>
> (The italics are ours.)

The truth is the Commission considered it was allowing going value by valuing the pipe, etc., as part of a completed plant instead of as junk. But this is not going value as is clearly pointed out by the New Jersey Court in *Public Service Gas Co. vs. Board of Public Utility Commissioners*, 84 N. J. L., 463 (1913), (a rate case in which $1,025,000 or 30 per cent. of the physical cost of the Paterson gas plant was allowed for going value). In that case the court said (p. 477):

> *"The argument addressed to us on the other side is that all the so-called going value appears in the valuation of the physical plant at the cost of reproduction; the suggestion is, that unless there was going value, the physical plant would be mere junk, and that the difference between the valuation of the physical plant at its cost of reproduction and its valuation as junk is the true going value. The argument seems to us specious rather than sound."*
>
> (The italics are ours.)

As indicated by the Superior Court, in its opinion in the case at bar (R., Vol. I, p. 103):

> *"The appellant would have been entitled to a return on the value as adopted by the Commission*

if it had just completed its construction and was ready to start business. * * * To take the familiar illustration of two plants identically planned, one completed, ready for business, there can be no question but that the one doing business is more valuable than the one not doing business; and it is not correct to say that the first plant, without business, should have a junk, scrap or second-hand value. The same is true of companies just starting in business. The reason given by the appellees' engineers for not allowing any sum for going cost was that at the time the valuation was made the company had a paying business. This omits the theory upon which present value as aided by reproduction cost is found. It must include all the charges necessary to duplicate the plant, allowing present day prices for the cost of construction. The present value, in the case before us, includes nothing for developmental, preliminary or going concern costs, or value as herein mentioned."

(The italics are ours.)

In the case at bar, the Superior Court also said (R., Vol. I, p. 102):

"The Commission declined to allow any sum for going concern cost or value. While it said due consideration would be given this item, its report expressly shows, in the separate items found, nothing was allowed for going value; in fact, the rate making value allowed was less than the reproduction cost of the physical property."

In the subsequent case of *Beaver Valley Water Company vs. Public Service Commission,* 71 Pa. Su-

perior Ct., 43 (1919) the Superior Court of Pennsylvania again discusses the question of going value in the Ohio Valley Water Company case (being the case at bar in this court) in the following language (pp. 49-51):

> "We pointed out that while the Commission said it would consider going concern value, *as a matter of fact it did not allow anything for that value.* We pointed to the schedule of reproduction cost new, less depreciation, made by the Commission, as printed on page 565, 68 Pa. Superior Ct. There are enumerated the several items of this cost, and these items in round figures amounted to $995,000. The Commission did not contemplate, nor was it ever contended in that case, that the item of going concern value or cost was divisible, to be attached to each of the separate items of physical property enumerated in that schedule. These items represented what it would actually cost—material, ground, labor, etc.—to reproduce the 'bare bones' of the plant. The original cost of the property, part of which it was admitted could not be ascertained, as found by the Commission, was $841,000, in round figures, not including sufficient amounts for interest during construction, engineering, general administration and other items; but, as is shown the normal increase in the value from the time of purchase to the present time of this physical property would make the difference between rate-making value and the partial original cost as found by the Commission, the records as to part of which were lost. This rate value as fixed by the Commission was in round figures $924,000.

There was no place in the Commission's findings for going concern value. It was not allowed. The record returned would have required a value for this item, determined by the testimony then before the Commission, or from such other tesitmony it desired to secure. It was stated no claim was made that the stockholders suffered by reason of dividends being unduly deferred while the business was being built up. We do not see how deferred divi dends could form any basis to fix going concern cost. The earnings of the company may go towards improvements, such as extensions, in which case the stockholders benefit in increased plant account. Whether the stockholders put any or all the money into the concern from their own purses, or use borrowed money, is not the chief concern before the Commission, although it may aid on the question of good faith to the public. The Commission does not act on the theory that issues of stock are controlling or are evidence to establish value. In the Ohio Valley case, as the bonds and indebtedness were $200,000 more than the value for rate-making purposes, the stockholders, under the Commission's orders, were held to be entitled to nothing. The earnings were barely sufficient to pay the interest on outstanding obligations, without considering a sinking fund to retire bonds as they fell due. What we thought the Commission should strive to secure is the present value for rate purposes.

In the present case, any reason which we might give for sustaining the item of going value would not be any more convincing than was given in the

Ohio Valley case, and the Supreme Court held our action in that case was a substitution of our judgment for that of the Commission's. It may be readily seen how that case controls the present one. There might be this possible difference in the present case. The Commission said: "Upon the basis of the reproduction cost new method of ascertaining value for rate-making, the Commission finds that the respondent has failed to sustain its claim for going value.' There was considerable evidence to establish this value, but the action of the Commission in the Ohio Valley case did not differ from its unequivocal action in the present case. *It did not allow the value in either case.*"

(The italics are ours.)

One method by which the Commission endeavored to justify its action in placing the fair value at a less amount than reproduction cost is the following statement contained in the majority supplemental report (R., Vol. I, p. 70):

"Likewise the unit prices of material and labor used in estimating reproduction cost are the prices prevailing at the time of the appraisal and which were in excess of the prices obtaining at the time the properties were constructed."

But the Commission is in error in stating that the unit prices used in estimating reproduction cost were the prices prevailing at the time of the appraisal. Mr. Rilling, in his dissenting report points this out, using the following language (R., Vol. I, p. 73):

"The reproduction cost new, less depreciation,

was determined and based on prices (as shown by the appraisements of the engineers and the conference agreement made in connection therewith) *as of March 1st, 1915, and not on present day-prices.*"

(The italics are ours.)

Further, it is the uncontradicted testimony of Mr. Chester, one of the engineers of the Water Company (R., Vol. II, p. 742) that the appraisement "is based on the average of the material prices for the last five years." That is to say, in order to get a perfectly fair basis, average prices over a period of five years preceding the appraisal were used. But even if the reproduction cost in 1915 were greater than when the plant was built, twenty years ago, the Water Company would be entitled to the 1915 reproduction cost.

In the Superior Court, the counsel for the Public Service Commission endeavored to argue that in placing the value on the *separate items* making up the physical property of the Water Company in reaching its estimate of reproduction cost, the Commission had included in the values placed upon said items an allowance for going value. This was a last ditch argument and, we submit, clearly untenable. We say this, (1) because the Commission in its supplemental report (R., Vol. I, p. 68) stated in so many words that in determining the reproduction cost of the property, "no amount should be included for going costs"; (2) because in the said supplemental report (R., Vol. I, p. 60)—original p. 125) is a schedule of the various items making up the reproduction cost, as found by the Commission, and line 24 of said schedule shows that nothing whatever

is allowed for going costs in the Commission's findings. (It should be noted also that nothing is allowed for going cost in the finding of the engineers for the defendants in error as shown by said schedule. That nothing was allowed for going value by the engineers for the defendants in error is also shown by the uncontradicted testimony of Mr. Chester (R., Vol. II, p. 707) to the effect that going value was one of the items not agreed upon by the engineers for the parties); (3) because as going value is based upon the value of the plant as a *whole,* it would not be possible to split it up and add it to the values of the various separate items of physical property.

Upon this point the convincing language of the Superior Court of Pennsylvania is as follows (R., Vol. I, p. 103):

> "It will not do, as argued by the appellees, to say that the item of going value was considered in the reproduction cost as returned by the engineers for the appellees. Aside from the fact that the engineers by their evidence excluded any such thought, it would be almost impossible to determine the going cost or value assessable to each factor comprising the property. It is only by considering the property as an entire operating concern that we are able to reach any conclusion on this item."

Inasmuch as the figures in the Commission's report referred to above amount to a demonstration that the Commission did not allow going value it will not do for the Commission to make the vague statement (R., Vol. I, p. 68) that *"consideration"* will be given to this

item in determining the fair value of the property. In *People vs. Willcox,* 210 N. Y., 479 (1914), the Court of Appeals of New York affirmed an order reversing a ruling of the Public Service Commission of that State because it made no allowance for going value in determining the value of the property of a lighting company. In that case, the Court of Appeals of New York said (p. 485):

> "If 'going value' is capable of ascertainment it will not do for the commission *vaguely to consider it* in fixing the fair rate of return. That no appreciable allowance was made in this case is shown both by the rate fixed and by the following statement in the opinion of the commission:
>
> 'It should be noted that the plant has been in operation for nearly twenty years, and it might be argued with considerable force that two decades should be sufficient for the company to recoup its early deficiencies below a fair rate of return, if any such deficiencies ever existed. If the company has not recouped itself by this time, under such circumstances it is doubtful whether the present consumers ought to be burdened for this reason.'
>
> The first question certified then resolves itself into two heads: 1. Is 'going value' a distinct item to be appraised and included in the base upon which the fair return is computed? 2. Was the evidence in this case sufficient to justify an allowance for it?"
>
> (The italics are ours.)

In line with the New York Court, the Superior

Court of Pennsylvania, speaking of going value, said (R., Vol. I, p. 103):

> "As it is a property right, *the Commission cannot vaguely consider it,* but where it exists as here shown, it must be allowed. While it may be said that the assessment of this value is difficult, still, as said before, difficulties will not justify confiscation."
>
> (The italics are ours.)

The Pennsylvania Public Service Company Law (Article V, sec. 20 (a), Pamphlet Laws of 1913, pp. 1374, 1415-1416 Purdon's Digest, 13th Edition, Vol. 6, pp. 7228-7229) specifically mentions "developmental and going concern value" as one of the elements of value which "shall be given such weight by the Commission as may be just and right in each case."

The Supreme Court of Pennsylvania fell into plain error upon the question of going value, stating in its opinion (R., Vol. I, p. 119):

> "In arriving at its estimate of the value of the property, the Commission considered it as a going operating concern, rendering successful service to the community, and being well patronized. It found that the properties *cost* $841,343, which, after deducting accrued depreciation, gave a present *value* by this method of $783,194 and upon this the Commission placed a fair value for rate making purposes of $924,744, or an increase of $141,550 over what it found to be the *present actual value.*"
>
> (The italics are ours.)

But the Commission did not find that the *cost* of the property many years ago was its *"present actual value."*

The Supreme Court of Pennsylvania was apparently under the impression that the difference between *cost* and the value allowed is going value. But it is perfectly obvious that this difference is not going value. To say that the difference between the *cost* of this property twenty years ago and the value allowed is going value would be to deprive the Water Company of any increase in the value of its property over the period of time mentioned. It would single out the Water Company from all the other property owners in this flourishing community and deprive it of every dollar of increase in the value of its property for a period of over twenty years. So far as we are aware, no other court and no commission has ever suggested such a thing and the Supreme Court of Pennsylvania is the sole sponsor for this remarkable theory. With all deference to the Supreme Court of Pennsylvania, we respectfully submit that this theory will not bear a moment's examination. We may say in addition, that the figure which the Supreme Court of Pennsylvania speaks of as cost is not the actual cost of the property, but partial and incomplete *book cost.* The failure of the Commission to allow going value was due to an erroneous legal theory, viz., that the difference between the junk value of the property and its value in place forming a complete plant was going value. This is the only possible explanation of the result reached by the majority of the Commission. There are three values of the plant of the Water Company:

(1) The value of the plant if the same were to be dismantled and sold piece-meal. This would be the junk or scrap value.

(2) The value of the completed plant, as a plant, just beginning operations but with no customers. This is a higher value than number (1) above.

(3) The value of the completed plant with customers and a well developed business. This is a higher value than number (2) above.

Going value is included in illustration number (3) above but is not included in either numbers (1) or (2). The Supreme Court of Pennsylvania, we respectfully submit, completely misapprehended the nature of going value in this case. On this point that Court said (R. Vol. I, p. 119):

> "The mere physical value of such a plant, considered apart from the fact that it is a going concern, would be only its scrap value."

From this language it appears that the Supreme Court of Pennsylvania holds that going value is the difference between illustrations numbers (1) and (2) above, whereas it is the difference between illustrations (2) and (3). It certainly is erroneous to say that the physical value of a plant considered apart from the fact that it is a going concern would be only its scrap value. The fact is that the value of a plant as a *completed plant* but without any customers is much higher than the junk or scrap value, but does not include a dollar of going value. This is clearly pointed out by

the New Jersey Court in *Public Service Gas Co. vs. Public Utility Board,* 84 N. J. L., 463 (1913), from the opinion in which case we have quoted (*Ante,* p. 232).

The Supreme Court of Pennsylvania erroneously assumes that going value has been allowed merely because the Commission has not restricted the value to the scrap value of the property and the Court entirely overlooks the fact that there may be a fully completed plant (illustration number (2) above) with no going value included. In fact, the reproduction cost as found by the Commission in this case was of a plant just completed and without including any allowance for going value and, as we have pointed out, the fair value of the plant as found by the Commission was actually *less* than the reproduction cost, although the Commission specifically stated that in figuring reproduction cost it had included nothing for going value. On this point the Superior Court of Pennsylvania said (R., Vol. I, p. 103):

> "The appellant would have been entitled to a return on the value as adopted by the Commission if it had just completed its construction and was ready to start business."

We submit, therefore, that there is no finding of fact by the Commission with respect to going value. On the contrary, there is merely an erroneous conclusion of law. The failure to allow going value was not only unsupported by any evidence, but was contrary to the uncontradicted evidence in the case. The Supreme Court of Pennsylvania made no finding of fact upon the question of going value but merely attemped to

support the Commission's refusal to allow going value by the adoption of an erroneous legal conclusion as indicated above.

In *Des Moines Gas Co. vs. City of Des Moines,* 238 U. S., 153 (1915), this court, speaking by Mr. Justice Day, pointed out (pp. 165-166) that in that case the company and its predecessors had long carried on its business *at higher rates* than the ordinance in question established and suggested that the company might have been compensated for going value in rates charged and collected under former ordinances. There is no room for the application of this principle in the case at bar. We have already pointed out that the old rates were entirely inadequate. Further, this is not a case in which the stockholders have received an amount equivalent to the going value of the property in the form of large dividends. During their entire existence, the Ohio Valley Water Company and its predecessors have paid out in dividends the total sum of $35,206.65. The only dividends paid by the Ohio Valley Water Company were $4,036 in 1910 and $6,053.90 in 1911 and by the Valley Consolidated Water Company $5,238.75 in 1902, $10,878 in 1903 and $9,000 in 1904 (R. Vol. II, pp. 1073, 1074).

As the Superior Court of Pennsylvania points out in its opinion (R. Vol. I, p. 103):

> "The evidence does not show that excessive earnings were made, no dividends of any consequence have been paid by the company, and there were no excessive interest charges paid on borrowed money on the value fixed. There is no evidence of

bad management in operation, nor is there any evidence that there was a surplus accumulated."

On the question of the amount to be allowed as going value in this case, the Superior Court held (R. Vol. I, p. 103):

"Considering the territory served, the number of miles of construction employed, the number of consumers already attached, the reasonable time within which the company should have accumulated a remunerative business, and the well recognized difference between a plant that is doing business and one that is just ready to do business, and the added value which must come from consolidation, *the lowest amount fixed by the appellant's evidence would not be an excessive value for this item.* It bears a very fair comparison with the amounts allowed by Commissions and Appellate Courts of other States."

(The italics are ours).

As hereinbefore pointed out, the lowest amount of going value fixed by the evidence of the Water Company was $185,000 testified to by Mr. Knowles (R. Vol. II, p. 846).

HEADING IV.

(*Ante*, p. 209.)

SUBDIVISION 3.

THE COMMISSION ERRED IN NOT ALLOWING SUFFICIENT VALUE FOR THE NEVILLE ISLAND REAL ESTATE OF THE WATER COMPANY.

For the Neville Island real estate the majority of the Commission allowed the sum of $48,800 (R. Vol. I, p. 64). The Superior Court (R. Vol. I, p. 100) sustained the finding of Commissioner Rilling to the effect that this real estate is worth upwards of $100,000 (R. Vol. I, p. 74). This would make an addition of $51,200 for this item.

The Water Company's pumping plant is at the head, or up-stream end, of Neville Island, in the Ohio River, and immediately adjoining it is a large sand bar owned by the Company, which is one of its most valuable assets. The great value of this sand bar is that it acts as a filtering medium. The water in the Ohio River is polluted and unfit to drink, but it is conceded that the water in the company's wells, which are drilled in the sand bar, is pure and wholesome (R. Vol. II, pp. 718, 850 and Vol. I, pp. 14 and 434). It was the uncontradicted evidence of Mr. McGrew, the Government engineer (R. Vol. II, p. 669 and pp. 664-665) that there is no other sand bar which at all approaches this one in

size within a space of two miles up stream and five miles down stream. It is further the uncontradicted evidence of Mr. Chester (R. Vol. II, pp. 717-718) that this property and the pumping plant are situate at the precise strategic location for supplying this territory. If the pumping plant were placed either farther up stream or farther down stream it would require a large additional outlay for pipe lines and additional operating expense. As Mr. Chester testified (R. Vol. II, p. 722) "Every foot that you would move from this location would necessarily lengthen the pipes to the reservoirs." The Supreme Court of Pennsylvania in its opinion (R. Vol. I, p. 116) comments on the fact that the land in question was purchased in 1904 for $3,900. *But that is not the whole story.* When the property was purchased in 1904 the value of the sand bar as a source of water supply was undeveloped. Since that time, the Commission finds, the Water Company has spent $28,654 in drilling wells (R. Vol. I, p. 54—Original p. 109, line 2). As a result of this expenditure the sand bar has developed a production of over 4,500,000 gallons of pure water per day (R. Vol. II, 696). The amount of water can be increased by drilling additional wells (R. Vol. I, p. 14). Therefore, the total investment in the land and wells is not $3,900, but a little over $32,500, without including the pumping station or equipment. Is it surprising that in the busy Pittsburgh district a property, in the purchase and development of which $32,500 has been spent, should be worth over $128,000 after a lapse of thirteen years during which time by such expenditure it has developed a production of more than 4,500,000 gallons of pure water daily? The figure of $128,000 is the value of the

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Neville Island land, including the sand bar and wells, taking Mr. Rilling's figure of $100,000 for the land. When the company began to develop this sand bar, it was a mere prospect as a source of water supply. Now it is a well-developed property producing an enormous quantity of pure, clear water every day. The situation is precisely the same as if a man purchased a tract of land thought to contain coal or oil and then, by opening mines or drilling wells, demonstrated the fact that it would actually produce either or both of these commodities cheaply and in large amounts. The wells of the company are sunk into this sand bar to a depth of from 28 to 35 feet (R. Vol. I, p. 14) and consist of large pipes which are perforated near the bottom, through which perforations all the water comes into the wells (R. Vol. II, pp. 704, 722). The result of this is that the water is filtered through a natural filter of some 20 feet of sand and gravel.

The majority of the Commission sought to break down the value of this sand bar in two ways—

FIRST. By laying stress upon the existence of the harbor line, and

SECOND. By denying that the sand bar is valuable as a filtering medium.

Of these in their order—

(a) *The Harbor Line.*

The survey of Mr. Millholland, Exhibit "K" (R. Vol. II, pp. 658 and 1023—Original p. 1837a) and the

third finding of fact of the Commission (R. Vol. I, p. 13) show that the Water Company owns about two acres of land on Neville Island and about seven acres of adjoining low land, the latter consisting of a sand bar situate between the United States harbor line and the low water line of the Ohio River. In view of the said third finding of fact by the Commision it is not necessary to argue the question of title, but we may say, in passing, that it is undoubted law in Pennsylvania that a land owner's title extends to the low water mark of a navigable river, such as the Ohio, subject to the public right of navigation between low water mark and high water mark. *Lehigh Valley R. R. Co. vs. Trone,* 28 Pa., 206 (1857); *Storer vs. Jack,* 60 Pa., 339 (1869) and other cases. By section 12 of the act of congress approved September 19, 1890 (Chap. 907, 26 Stat. 426, 455) and by section 11 of the act of congress approved March 3, 1899 (Chap. 425, 30 Stat. 1121, 1151—U. S. Compiled Statutes Vol. 10, sec. 9912) the secretary of war is authorized to establish harbor lines in navigable rivers. This legislation was discussed and the right of the secretary of war to act thereunder was upheld by this court in *Philadelphia Co. vs. Stimson, Secretary of War,* 223 U. S. 605 (1912). In its report on petition for rehearing (R. Vol. I, p. 64) the Commission lays stress on the fact that the sand bar is within the harbor line and that the use thereof is subject to a permit issued by the United States Government which may be revoked. The Commission was clearly in error in using the harbor line for the purpose of breaking down the value of this sand bar, and the Supreme Court of Pennsylvania in its opinion (R. Vol. I, p. 118) fell into the same error

using the following language with respect to the sand bar:

> "Its absolute title ceased at high water mark. It had merely a qualified right to the use of the land between high and low water mark, and its occupancy of that portion of the property, which lay below high water mark, in a navigable river, was dependent upon the grace of the government, and *such favor could not justly or properly be made a basis for capitalization, as against the public.*"
>
> (The italics are ours).

That the Supreme Court of Pennsylvania is in error in its legal conclusion on this point is squarely ruled by this court in *City and County of Denver et al. vs. Denver Union Water Company*, 246 U. S., 178 (1918). In that case, which was also a rate case, it appeared that the ordinance authorizing the company to occupy the streets was of indefinite duration and was terminable either by the city or by the company. It was, therefore, argued that as the company could be required to remove its pipes from the street on short notice the property had only a junk value. This court, however, declined to adopt such a theory and speaking by Mr. Justice Pitney said (p. 191):

> "Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance. The reason is not obscure: the cost and detriment to a property owner attributable to the use of his property by the public, and the value of the service rendered by the property to the

public, are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue. The cost of the service includes the use of the plant, but, ordinarily, not its destruction, except through the slow processes of wear and tear and obsolescence, for which graduated depreciation allowances are made. The whole calculation is a matter of income, not capital, accounting; and the cost and value of the use of a given property for a stated period is the same whether the use is to be continued after the expiration of the period or not. If the period is extended, compensation for the use is extended proportionately."

The case at bar is much stronger for the company than the Denver case, first, because the contingency that the sandbar will be removed is in the highest degree unlikely and, second, because in the Denver case the city (a party to the case) could require the removal of the pipes from the streets, whereas in our case no one but the United States Government can require the removal of the sand bar. To show that such a contingency as the removal of the sand bar is in the highest degree remote, we respectfully request your honors to note that the *sand bar in question is at the head of Neville Island, is nowhere near the navigable part of the river, the wells and pipes are beneath the surface of the bar and if they interfered with navigation the permit would never have been granted by the War Department.* Every one familiar with Pittsburgh knows, and it is the uncontradicted evidence of the government engineer, Mr. McGrew (R. Vol. II, p. 662) that it is a common thing

for the Secretary of War to grant permission to build structures beyond the harbor line where such structures do not interfere with navigation. The government engineer clearly showed and his testimony was uncontradicted (R. Vol. II, pp. 662-664) that the sand bar is nowhere near the navigable part of the river and that *it is a point at which it would be practicable to build beyond the harbor line without materially interfering with navigation.* In view of the location of the sand bar and the fact that the pipes and wells are beneath the surface thereof, will any one believe that the War Department will require their removal and thus interfere with the supply of water to this populous community? The fact is that, so far as human intelligence can predict, the sand bar and wells will never be removed from their present location. Such a contingency as a compulsory removal is at least as remote as countless other contingencies which might affect the value of real estate and which are disregarded by sensible men. The fact that the sandbar has been used for many years without objection on the part of the United States warrants the conviction that there will be no change in the future. Further, as the Superior Court very well said in its opinion (R. Vol. I, p. 99):

> "If the appellant's title should be taken away at some future time, and its value should be of such weight as to enter materially into the basis on which the schedule of rates was fixed, the Commission can readily adjust the rates; but until that time the appellant is entitled to what it bought, paid for, improved and is now using."

(b) *The Value of the Sand Bar as a Filtering Medium.*

During the greater part of the year nearly the whole area of the sand bar owned by the Water Company is covered by the Ohio River. It is burdensome to be required to argue that water will percolate through a sand bar consisting of coarse, loose sand and gravel. Yet we are forced to make this argument by the attitude of the majority of the Commission in this case. In the endeavor to break down the value of the sand bar the majority of the Commission used the following language as part of its sixth finding of fact (R. Vol. I, p. 14):

> "The source of respondent's subterranean water supply was not clearly shown."

This was a purely arbitrary finding and was not based upon any competent evidence. It was the uncontradicted evidence in the case that there is beneath the Ohio River a so-called subterranean stream, which merely consists of water percolating through the soil. It moves so slowly (as we shall show presently) that it would be more properly described as a reservoir than a stream. It appears that this underground stream can be reached not only by drilling wells on the sand bar, but also by drilling wells on Neville Island and it was, therefore, argued that this sand bar is not more valuable as a source of water supply than land on Neville Island. But it does not appear from any competent evidence in the case that anything like the *amount* of water can be obtained from wells on Neville Island as from the Water Company's sand bar. This cannot be controverted for a very obvious reason. The Ohio River does not flow over Neville Island, whereas for the greater part of the year, as stated above, the water from the river does

extend over this sand bar. Therefore, the Water Company has two sources of supply, one by percolation through the sand bar, the other being this so-called subterranean stream, whereas on Neville Island there is only one source of supply, viz., the subterranean stream. Upon this point the Water Company produced Mr. Myron L. Fuller, a well known and remarkably well qualified expert on the subject of ground water problems. Mr. Fuller testified (R. Vol. II, pp. 752-753) that there is an underground reservoir of water beneath the Ohio River *which moves down stream at the rate of only three or four feet in a day.* Inasmuch as the water in the so-called subterranean stream moves so very slowly, it is obvious that considerable time would elapse before any change in the flow or quality of the subterranean stream would affect the water in the wells. But it is the uncontradicted evidence of Mr. Schultz, the engineer at the plant of the Water Company, (R. Vol. II, pp. 697-698 and 702-704) that when the Ohio River rises and the water in the river becomes consequently softer *the water in these wells becomes softer within four to five hours;* also that *when more water from the river comes into the back channel where the back channel wells are located, the back channel wells increase in production within 1 to 2 hours.* The taking of testimony in this case continued over several months; numerous meetings were held; the books and records of the Water Company were thrown open to the defendants in error and the plant and wells were available for inspection at any time. Therefore, if this testimony of Mr. Schultz as to the manner in which the water in the wells was affected by the changes in the Ohio River could have been controverted it would have been con-

troverted. We emphasize this point because it has such an important bearing upon the value of the sand bar as a filtering medium. In view of the testimony of Mr. Schultz as to the change in the character of the water in the wells immediately after a change in the level of the Ohio River, Mr. Fuller testified, in substance, (R. Vol. II, pp. 753-754) that there is undoubtedly a filtration of water from the river through the sand bar into the wells and that probably more than one-half of the water that comes into the wells comes from the Ohio River. This is also the testimony of Mr. Chester (R. Vol. II, pp. 719-723) and Mr. Knowles (R. Vol. II, p. 849). In this connection the Supreme Court of Pennsylvania in its opinion (R. Vol. I, p. 116-117) comments particularly upon the testimony of Mr. Hice and Mr. Leaf, experts called by the defendants in error, as supporting the view that the water in the wells does not come from the ordinary channel of the river but from this so-called subterranean stream. The danger of considering the evidence on only one side of a case, instead of on both sides, is well illustrated by what we are about to point out. Instead of the testimony of Mr. Hice being to the effect that the water does not percolate from the Ohio River through the sand bar, if all the testimony of this witness is examined as well as the above mentioned evidence showing the quick changes in the water in the Company's wells, corresponding to changes in the Ohio River, it will be found that *Mr. Hice's evidence not only does not controvert but strongly corroborates the evidence of the Water Company to the effect that a large amount of the water from the Ohio River does percolate through this sand bar into these wells.* Mr. Hice testified, in substance, (R. Vol.

I, p. 503) that the usual thing is that the level of water in wells in these gravels while it will be affected to some extent by the stage of the river *it lags very far behind,* while if there was an easy flow from the stream it would not do that. Mr. Hice also testified, in substance, (R. Vol. I, p. 501) that *if in times of low water the supply in the wells of the Water Company is materially less, it would be a natural and proper inference that the water in the wells came largely by filtration from the Ohio River through the sand bar instead of from the subterranean stream.* Stronger corroboration of the testimony of Mr. Fuller could not be desired.

Mr. Leaf admits (R. Vol. I, p. 505) that he never examined the wells on the sand bar in detail and that he did not see the material that was brought out of them. Mr. Leaf nevertheless testified (R. Vol. I, pp. 506, 510, 511-513) to the existence of a layer of hard pan in the sand bar which would prevent the river water from filtering through the sand bar into the wells. The Water Company called Mr. Allen, *the witness who actually dug the wells,* who testified, in substance, (R. Vol. II, p. 793) that he found no hardpan in the sand bar; on the contrary in digging the wells he found *practically nothing but coarse loose sand and gravel.*

It is manifest, therefore, that the source of the subterranean water supply of the Company was clearly shown, namely,

1. The subterranean stream, and

2. Percolation through the sand bar,

and the Commission's finding that the source of supply was not clearly shown not only violates good sense, but the uncontradicted evidence in the case.

The defendants in error also endeavored to show that a supply of water similar to that found in the sand bar could be obtained anywhere on Neville Island by the following witnesses: Messrs. Pittock, Smith, Morrow, Allen and Dickson. Mr. Pittock's testimony on this point will be found in the Record Vol. I, pp. 253-256. Mr. Smith's testimony will be found in the Record Vol. II, pp. 307-310. Messrs. Morrow and Allen were much the best posted witnesses for the defendants in error on this point. Mr. Morrow was the former engineer of the Bellevue and Riverview Companies (predecessors of the Ohio Valley Water Company) (R. Vol. I, p. 355). He testified (R. Vol. I, pp. 357-358) as to the possibility of obtaining water at other points on Neville Island. The witness was careful to state, however, (R. Vol. I, p. 359) that the wells must be spread out and that in the wells on Neville Island there is some variation as to the quantity of supply. We respectfully request your Honors particularly to note that this witness testifies, in substance, (R. Vol. I, p. 361) that if a man were to drill a well in the center of Neville Island nobody could tell *how much* water he would get until after the well was put down. Mr. Allen testified (R. Vol. I, pp. 422-424) that in addition to the wells on the sand bar of the Water Company he drilled four wells on Neville Island and one in the rear channel; also two on Brunots Island; also 40 for the Pressed Steel Car Company on the sand bar in front of the works of that company on the left bank of the Ohio River, and that at these various

points it is possible to secure water equal in volume and purity to that furnished by the Ohio Valley Water Company. This is a long way from saying that a *sufficient supply* of water can be secured anywhere on Neville Island. It will be noted that Mr. Allen's opinion with respect to the quantity of water procurable at these various points contains an important qualification, namely, that the wells be placed far enough apart. He says (R. Vol. I, pp. 424 and 426) that the supply depends on the distance the wells are apart. He admits on cross examination (R. Vol. I, p. 424) that the only way to determine the quantity of water a well will produce is by a test. He also testified, in substance (R. Vol. I, p. 425) that *in wells on the river front* there will be a greater pressure and they will produce more water than in the center of the Island. Mr. Dickson testified (R. Vol. I, p. 418) that he put down one well on his property on Neville Island from which "We get from 90 to 100 gallons a minute. In other words, about a hundred thousand gallons a day." It is hardly necessary to point out that the production of a single well does not justify the conclusion that an enormous water supply such as is produced from the sand bar can be obtained on Neville Island.

Exhibit "K" (R. Vol. II, p. 1023—original p. 1837a) shows that there is a back channel of the Ohio River between Neville Island and the left bank of the river. This back channel joins the Ohio River proper at the head of Neville Island. It is obvious, therefore, that the location of the Water Company at the head of Neville Island is unrivaled in this particular —that both back channel wells and river wells of very

great production can be obtained with little expenditure in the matter of laying pipe lines. Mr. Chester points out (R. Vol. II, pp. 721-722) that while back channel wells could be obtained farther down in the Island yet *there is no river bar where river wells could be obtained,* and that it has been the salvation of the company to have both river wells and back channel wells "for there have been times when one has so depreciated that if we did not have the other we would have been out of water." Mr. Chester shows very clearly (R. Vol. II, p. 721) that under the varying conditions which apply at Neville Island depending upon low or high water and whether the wickets of the dam are up or down both back channel wells and sand bar wells are necessary in order to secure an adequate supply of water.

On the question of the value of the Neville Island real estate the evidence would have justified an allowance largely in excess of the figure of $100,000 fixed by Commissioner Rilling in his dissenting report. On this question the Water Company called Messrs. Sharp, Kane and Cooper, three well known and able experts on land values. Mr. Sharp testified, in substance (R. Vol. II, p. 771) that the value of this Neville Island land is $270,000, exclusive of the buildings. Mr. Kane testified, in substance, (R. Vol. II, p. 782) that the value of the land is $235,000, exclusive of the buildings, and Mr. Cooper testified, in substance (R. Vol. II, p. 789) that the value of the land is $235,224, exclusive of the buildings. The only witnesses of the defendants in error who testified to the value of the Neville Island land are Messrs. Pittock, Carter, O'Donovan, Ferguson, Dickson and Hamilton. It should be particularly noted

that none of these witnesses of the defendants in error gave proper consideration to the value of this Neville Island property for its highest use, viz., for the purposes of water supply. Mr. Pittock testified, in substance, (R. Vol. I, p. 255) that the sand bar is worth only $400 per acre. Further comment on his testimony is unnecessary. Mr. Carter testified, in substance, (R. Vol. I, p. 260) that he is unable to give the value of the sand bar. Mr. O'Donovan testified, in substance (R. Vol. I, p. 267) that he has not based his figures on any extraordinary value of the property by reason of filtration of water through the sand bar. Mr. Ferguson testified, in substance (R. Vol. I, p. 405) that the nearest sale to this property with which he was familiar was the sale of the Hamilton property about the middle of Neville Island, which would be 3½ miles away. That is where the land is used for truck gardening and other general purposes. It is obvious that this witness's valuation of $2,000 per acre has no reference to the value of the sand bar for filtration. Mr. Dickson testified, in substance, (R. Vol. I, p. 421) that he gives no value to the sand bar and knows nothing of the value of the land for water works purposes. He said (R. Vol. I, p. 420) that he is a truck gardner. Mr. Hamilton testified, in substance, (R. Vol. I, p. 440) that he just figured the value of the land on the bank (i. e., the higher portion of the property, not the sand bar) at $2,000 per acre for manufacturing purposes. We respectfully submit that testimony like that of these witnesses of the defendants in error should not be permitted to weigh for a moment against the testimony of the witnesses of the Water Company as to the value of this property for water supply purposes. Is the highest use of this property

to be eliminated? Should the witnesses of the defendants in error be permitted to shut their eyes to the obvious facts and ignore the great value of this sand bar? If anything can be valuable in the busy populous Pittsburgh district it is a property which will produce 4,500,000 gallons of pure clear water daily, which amount can readily be increased by additional wells. In view of these facts there is a solid foundation for the evidence of Messrs. Kane and Cooper (R. Vol. II, pp. 782, 790), who testified, in substance, that if by some cataclysm the Water Company's plant should be entirely destroyed leaving only this land at the head of Neville Island and the sand bar unimpaired, the said land and sand bar could be sold in the market for $235,000. Both of these witnesses testified that this Neville Island property would sell for that figure in the open market in view of its proved use and development.

On the subject of the Neville Island real estate the Superior Court of Pennsylvania very properly said (R. Vol. I, p. 99):

> "A special value is claimed for this property. The appellees would limit it to the price fixed for lots immediately adjoining, or in the vicinity; it is contended that water of the same quality as secured by appellant could be procured from the adjoining lots. The appellant is dealing with what has been done, and not with a problematical use of adjoining properties; and, while it was shown that one particular property produced a certain supply of water for one well, we have here a property on which is located a number of wells, with a sand bar,

which, according to the Government engineer, was approached in size by none within a space of five miles down the stream and two miles up the stream."

We also respectfully refer to the following language of Commissioner Rilling, in his dissenting report, (R. Vol. I, p. 74):

"We are of opinion that the value of the Neville Island property is greater than that allowed. This property owned by the respondent has thereon its source of supply secured by drilling wells. It is not only sufficient to meet the needs of the respondent, but it is also of proper quality. We are not justified in assuming that a like source of supply can be secured at any place along the Ohio River, although some witnesses expressed their opinion to that effect. At no other place along the said river have a sufficient number of wells been drilled to prove the correctness of such opinion. The Monongahela Water Company was unable to secure a proper source of supply by the drilling of wells in the Ohio River a short distance above Neville Island. Without this source of supply the respondent would be put to great expense to provide another, which would mean greater investment and therefore increased rates.

We think this source of supply on the land owned by respondent and as developed by it, is such an asset that it should be considered and allowed at its proper value in determining the fair valuation of its property. In our opinion the nine

acres of land at the head of Neville Island with its source of water supply thereon have a fair valuation of upwards of $100,000.00"

To recapitulate—the Commission's finding with respect to the Neville Island real estate cannot be supported—

1. Because with respect to the harbor line an erroneous conclusion of law and finding of fact are so intermingled that the finding is in no sense a finding of fact.

2. The finding that the source of the subterranean water supply was not clearly shown is purely arbitrary and is certainly not supported by any substantial evidence in the case. In fact, it is not supported by any competent evidence.

The same criticism, we submit, applies to the treatment of this subject by the Supreme Court of Pennsylvania. We maintain, therefore, that Commissioner Rilling's finding (R. Vol. I, p. 74) that the Neville Island real estate with its source of water supply has a fair value of upwards of $100,000 and the opinion of the Superior Court upholding said finding (R. Vol. I, p. 100) are correct. If this conclusion is sound then, inasmuch as the Commission allowed only $48,800 for the Neville Island real estate, there should be an addition of $51,200 for this item.

HEADING IV.

(*Ante*, p. 209.)

SUBDIVISION 4.

THE COMMISSION ERRED IN NOT ALLOWING SUFFICIENT VALUE FOR THE MONONGAHELA WATER COMPANY PARALLEL LINES NOW OWNED BY THE OHIO VALLEY WATER COMPANY.

The Monongahela Water Company was a large company which formerly furnished water to the public south of the Ohio River in Pittsburgh, McKees Rocks, and other territory. In 1909, about 75 per cent. of the property of the Monongahela Company was purchased by the City of Pittsburgh (R., Vol II, p. 675). The Monongahela Company still owned a comparatively small amount of other property including some pipe lines in McKees Rocks and adjoining territory. Most of the pipe lines in McKees Rocks were parallel to the lines of the Ohio Valley Water Company, the two companies being in competition in that territory (R. Vol. I, p. 56). In 1913, the Ohio Valley Water Company purchased 97 per cent. of the capital stock of the Monongahela Water Company and proceeded to complete the liquidation of that company selling the pumping station and the pipe line extending to the Ohio Connecting Railroad Company to the railroad company for $60,000 and turning over to itself the pipe lines in

McKees Rocks and adjoining territory (R., Vol. I, pp. 55-56). In November, 1914, the former Monongahela pipe lines were coupled up with the lines of the Ohio Valley Water Company. The water of the latter was turned into these lines and the Monongahela lines have since been operated with the lines of the Ohio Valley Water Company, since which time there has been little shifting of consumers from the lines of the former to the lines of the latter (R., Vol. II, pp. 672-673). It is the uncontradicted evidence of Mr. Beech (R., Vol. II, p. 674) *that in 1915, fourteen additional consumers went on the Monongahela lines. It is also the uncontradicted evidence of Mr. Beech (R., Vol. II, p. 677) that in 1915 from the pipes of the old Monongahela system, the Ohio Valley Water Company was receiving about $11,000 gross revenue per annum.* (No year later than 1915 is mentioned because the taking of testimony in this case was closed in that year). It was the uncontradicted testimony of Mr. John M. Hastings that the only cost to the Ohio Valley Water Company in operating the Monongahela pipes was what extra coal would be required in pumping the additional water (R., Vol. II, p. 833). Messrs. Chester and Knowles testified (R., Vol. II, pp. 717, 732 and 844) that these Monongahela Lines where parallel to the lines of the Ohio Valley Water Company are valuable not only as spare lines but for future extensions for adjoining territory, Mr. Chester testifying that he has known few plants in growing towns that did not have pipes paralleling other lines on the same street. The *non-parallel* lines of the Monongahela Company were valued by the Commission as well as by the engineers for both sides at $18,365 (R., Vol. I, p. 61—original p. 125, line 15)

and no question is raised as to value of same in this case. The *parallel* lines of the Monongahela system were valued by the Commission at only $21,331, although the reproduction cost, less depreciation of said parallel lines was, as the Commission admits, *agreed upon between the engineers for both sides of this case as being $63,992* (R., Vol. I, pp. 64-65 and 61—original p. 125, line 16 and Exhibit "R", R., Vol. II, pp. 1110-1111).

In the paper book or brief filed by counsel for the Public Service Commission in this case in the Superior Court and in the Supreme Court of Pennsylvania it was specifically admitted (on page 21 thereof) that the cost of reproduction of these Monongahela parallel lines was agreed upon by the engineers of the parties at $66,073. In the Record Vol. 1, page 61, original page 125, in setting forth the amounts as estimated by engineers for complainants (viz., the defendants in error) line 16 representing these Monongahela parallel lines is left blank not to indicate that the engineers had not agreed upon the reproduction cost of same, but to indicate that the engineers of the defendants in error had not agreed that the amount of this reproduction cost should be included as a proper item.

It is seen, therefore, that while the engineers for both sides agreed that the reproduction cost, less depreciation, of the lines of the Monongahela Company both parallel and non-parallel aggregate $82,357, the Commission, as stated, allowed $21,331 for the parallel lines and $18,365 for the non-parallel lines or a total of $39,696, viz., less than half the reproduction cost.

The Commission did this on the theory that as to the parallel lines this was a case of over-development and that the water company should, therefore, be allowed only one-third of the reproduction cost of these parallel lines (R. Vol. I, pp. 64-65). But this theory, as a matter of law, cannot apply in the case at bar. The theory of over-development is that when a plant is built too large for present requirements its value must be reduced correspondingly until such time as the community develops sufficiently to require the service of such a plant. But these Monongahela lines have been in use for many years and *the business has already developed.* As we have just pointed out, it is the uncontradicted evidence in this case that from the pipes of the Monongahela system the Ohio Valley Water Company receives a gross revenue of about $11,000 per annum and that the only cost in operating the Monongahela pipes is the extra coal required in pumping the water; further, the revenue from the Monongahela lines is increasing, it being the uncontradicted evidence that in 1915 fourteen additional consumers went on the Monongahela lines. If all the property of the Ohio Valley Water Company is worth approximately $1,325,000, as found by the Superior Court, and if all the Monongahela lines are valued at $82,357, as required by the Superior Court (R., Vol. I, pp. 101-102), the gross income from all the Monongahela lines at $11,000 per annum is at a greater rate than the gross income from the entire property, which gross income amounted to $162,249.82 for the calendar year 1914 applying the new rate schedule adopted by the Water Company in December, 1913, to all the water supplied

in 1914 for all purposes (R., Vol. I, p. 16—original p. 29, next to last column). (The year 1914 is taken to make this comparison because the taking of testimony in this case was concluded in the year 1915 before the figures showing the revenue of the Water Company for the year 1915 were available.)

To test this question in another way, the value of all the property of the Water Company as fixed by the Commission is $924,744 (R., Vol. I, p. 40) and the gross revenue allowed by the Commission thereon is $135,167.66 (R., Vol. I, p. 39) or at the rate of a little less than 17 per cent. If all the Monongahela lines, both parallel and non-parallel, are valued at only $39,696, which is the value placed on them by the Commission (R. Vol. I, p. 61—original p. 125, lines 15-16 last column) these Monongahela lines, which produce a gross revenue of $11,000 per annum, are producing at the rate of over 27 per cent. per annum upon the said valuation of $39,696. The action of the Commission in fixing the value of the Monongahela parallel lines at only one-third of the agreed reproduction cost of said parallel lines, less depreciation, is absolutely arbitrary and is not justified by any evidence in the case or otherwise. The over-development theory cannot, in law, be applied because the Monongahela lines have been in service for many years, carry a well developed business, serving many consumers and the revenue therefrom is not only at a rate far in excess of the rate permitted by the Commission upon the entire property of the Ohio Valley Water Company, but the revenue is more than sufficient to show an adequate return on the valuation

of $82,357, which is the valuation placed by the Superior Court upon all the Monongahela lines, both parallel and non-parallel.

It is obvious, therefore, that the Commission's valuation of the Monongahela lines is not only arbitrary and unsupported by any evidence in the case, but is also the result of the application of the theory of over-development, which, as a matter of law, cannot be applied under the facts in this case. The same thing applies to the treatment of this question by the Supreme Court of Pennsylvania, which court on this point said (R., Vol. I, p. 118):

> "The determination of what was necessary, and what was over-development under the circumstances, was clearly within the proper function of the Commission, and where, as here, the finding is sustained by competent evidence, and no abuse of discretion is shown, the finding should not be disturbed by the Court on review."

It will be observed that the Supreme Court of Pennsylvania makes no finding of fact with respect to these Monongahela lines, but rests upon the Commission's application of the theory of over-development, which is clearly erroneous under the facts here presented.

We respectfully submit that the following finding of the Superior Court is correct and should be sustained (R., Vol. I, pp. 101-102):

> "So, too, with respect to the parallel lines in question. The Commission valued these parallel

lines at one-third of the value fixed by the engineers, $63,992, or $21,331. From a total valuation of $39,696, parallel and non-parallel lines, the appellant has a return in revenue of $11,000. These lines are useful for the present operation and for future development and they became very necessary in case of trouble with the other line. The reproduction cost should have been allowed as fixed by the engineers, $63,992, and the total reproduction cost of the Monongahela system would then be $82,357."

HEADING IV.

(*Ante.*, p. 209.)

SUBDIVISION 5.

THE COMMISSION ERRED IN NOT ALLOWING BROKERAGE OR DISCOUNT ON SECURITIES.

The Commission allowed nothing for brokerage or discount on securities. The Superior Court (R. Vol. I, p. 105) held that 7½ per cent. of the reproduction cost should be allowed for this item. The value of the property as found by the Superior Court, omitting brokerage, is $1,232,206.33. It is clear, under the evidence, that the said amount does not exceed the reproduction cost of the property. Seven and one-half

per cent. of the last mentioned amount is $92,415.47, which we claim should be allowed for brokerage or discount on securities.

This item represents a reasonable discount which it is necessary to allow in placing securities for the purpose of raising money to build the plant at the inception of an enterprise of this kind. Suppose a company starts to build a plant for the supply of water and wishes to borrow $100,000. If it can only sell its bonds at 90% of par, it would receive for $100,000 in par value thereof the sum of $90,000 in cash. This leaves $10,000 which the company has to raise in some other way and, of course, it will have to pay at maturity $100,000 for the said amount in par value of bonds, although it received only $90,000 for same when they were sold. This is the cost of obtaining capital and we submit is just as real an element of cost as the outlay for the pipe lines of the company.

The bonds of the Water Company bear interest at only 5 per cent. per annum and the mortgage securing them contains no provision for a sinking fund. It is perfectly obvious that at the inception of this enterprise when the company was untried and its property undeveloped it would not be possible to sell these bonds at par. It was the uncontradicted evidence in the case that it would not have been practicable to raise money to build this plant without placing the securities at a very considerable reduction or discount below their par value. This was the testimony of Messrs. Bell and Liggett (R. Vol. II, pp. 826-827 and pp. 829-831). Under the uncontradicted evidence the

discount would have been considerably in excess of 7½ per cent., but we make no claim for any discount in excess of that rate. As shown by Exhibit "R" (R. Vol. II, p. 1110) it was agreed between the engineers for both sides that 7½ per cent. is the correct percentage for brokerage, although the engineers for the defendants in error did not agree that brokerage is a proper item. The agreement as to said percentage referred to in Exhibit "R" appears also in the testimony of the engineers of defendants in error as follows: Mr. Gannett (R. Vol. II, p. 609); Mr. Miller (R. Vol. II, p. 856). It also appears in the engineers' agreement, Exhibit 20 (R. Vol. II, p. 989).

The Commission allowed no brokerage or discount on securities because it says (R. Vol. I, pp. 35, 57, 67):

> "• • • no sufficient evidence was furnished showing that any sum had been paid by the respondent for that purpose."

Yet the Company's books showed, and the evidence in the case is uncontradicted to the effect that the property was financed and the underlying companies purchased mainly by the issue of securities. In fact the Commission (R. Vol. I, pp. 38, 57-58, 71, 72) complains that the securities issued were greater in amount than the value of the property. The Commission's statement that no brokerage or discount was allowed is, therefore, a purely arbitrary assumption contrary to the evidence in the case and directly in the teeth of the Commission's finding that securities were issued in excess of the value of the property. What the Commission means by its statement is that there was no

separate entry on the company's books of any amount specifically described as brokerage or discount on securities. But the evidence clearly showed that the company's books were incomplete in many particulars and were not scientifically kept. The evidence was uncontradicted that such is usually the case. In fact, scientific bookkeeping with proper entries for future valuation in rate making cases was unknown twenty years ago. If the bookkeeper of the Water Company had known enough to enter upon its books a part of the discount it had to bear in placing its securities, this apparently would have satisfied the Commission. We submit, however, that this question should not be determined by the failure to make proper book entries. In this connection, the Supreme Court of Pennsylvania said in its opinion (R. Vol. I, p. 120):

> "In the present case, the company makes no claim that it ever actually paid any brokerage for the sale of its bonds, and if it had, such an item should properly be considered in connection with the interest charged, and should not be included in the fixed capitalization of the company as the basis of a permanent charge against the public."

We are wholly at a loss to understand why the Supreme Court of Pennsylvania made a statement of this kind. With all deference, we submit that the statement is erroneous both as to fact and as to law. The Water Company most emphatically did claim that it had paid a large amount of brokerage or discount in placing its securities. The amount of securities issued for the various properties and companies purchased are shown upon the company's books even if it did not

specifically set aside any particular sum as brokerage or discount and this claim was insisted upon both before the Commission, the Superior Court and the Supreme Court of Pennsylvania. After all these years, the company could not, of course, show by direct evidence the amount of brokerage or discount paid, but it produced the best evidence in its power, namely, the testimony of experienced and reputable bond salesmen (Messrs. Bell and Liggett) which was entirely uncontradicted, and the engineers' agreement that 7½ per cent was the proper charge, if a charge should be allowed. So far as the law is concerned, we respectfully submit that the Supreme Court of Pennsylvania erred in ruling that brokerage or discount on securities is not a proper capital charge. The modern authorities hold that a reasonable amount of discount on securities is a proper capital charge—

In *Montana W. & S. R. Co. vs. Morley et al,* 198 Fed., 991 (1912), an allowance of 15% or $84,407.38 was made for discount on securities (see p. 1003).

In *Superior Commercial Club vs. Superior Water, Light & Power Co. 10 Wis. R. R. Commission Reports,* 704 (1912), the Wisconsin Commission, in a rate case, allowed as part of the value of the property (pp. 740-741), the sum of $100,000 as discount on bonds.

In *re Janesville Water Co.,* Public Utility Reports, 1915-A-178 (Wis. R. R. Commission, January, 1915), a purchase case, it was held (pp. 197-198) that an allowance may be made for a discount on bonds where the discount is a normal and reasonable cost of getting

money to finance the utility, where the utility is needed in the community and where money for financing it can be obtained on no better terms.

In *re Omaha & Lincoln Railway & Light Co.,* Public Utility Reports, 1916-B-564 (Nebraska State Railway Commission, December, 1915), the question being as to an issue of securities, 15% of the cost of the property was allowed for the cost of financing.

If brokerage or discount on securities is a proper capital charge, which we submit is plain, it should be figured in as part of the cost of the property on which a fair return is to be allowed. The theory suggested by the Supreme Court of Pennsylvania, which we have not seen suggested by any other Court, namely, that the item should be considered "in connection with the interest charged," would be a great hardship on the consumers because it would require this item to be sunk by the addition of the necessary amount each year to the revenue of the company. This would place a much greater burden on the consumers than by treating the item as a capital charge and allowing a fair return thereon.

The failure of the majority of the Commission to allow anything for brokerage or discount on securities is not only unsupported by any evidence but is contrary to all the evidence in the case and is further due to an erroneous conclusion of law. The same thing is true in regard to the treatment of this question by the Supreme Court of Pennsylvania.

Upon this question the Superior Court of Pennsylvania said (R. Vol. I, p. 105):

> "The appellant should be allowed a certain per cent for brokerage, or discount. There was sufficient evidence before the Commission to determine the fair amount and while the company, in undertaking to allow exorbitant amounts, fell into error, and such issues were clearly unreasonable and grossly in excess of any fair demand, still we cannot deny to the innocent stock and bondholder the justice of securing a reasonable allowance for brokerage as a capital charge. In so doing we do not give any consideration whatever to inflated or fictitious values; the evidence before the Commission was that seven and one-half per cent of the reproduction cost would be a fair amount. When based on reproduction cost, the discount is limited to actual value and no fictitious charge is allowed as it would be if calculated on an issue of stocks and bonds where the utility was created solely from the money received from the sale of bonds. This for a new concern does not seem unreasonable."

If our argument is sound with respect to the five elements of value (*ante*, p. 210) directed to be added by the Superior Court of Pennsylvania, the sum of $399,877.80 should be added to $924,744, being the value of the property fixed by the majority of the Commission, which would make the fair value of the property $1,324,621.80 instead of the last mentioned amount. It should be noted that the Superior Court is not obliged to express its findings in any particular formal manner.

The same principle applies to the decision of the Superior Court as was applied by the Circuit Court of Appeals of the Second Circuit in *Lehigh Valley Railroad Company vs. American Hay Co.*, 219 Fed., 539 (1914) in which it was held in an opinion by Judge Lacombe that the Interstate Commerce Commission is not required to make any formal, numbered and marked findings, but that its findings may be contained in the colloquial statements of the opinion.

There are a number of other points as to which we believe the Commission erred in not allowing sufficient values for the property of the Water Company. In order, however, to reduce the number of the disputed points, we are willing, for the purposes of this case, to have the said figure of $1,324,621.80 taken as the value of the property. In this connection, we point out that Mr. Chester testified (R. Vol. II, p. 710) that the fair value of the property for rate making purposes is approximately $1,500,000. Mr. Knowles testified (R. Vol. II, p. 853) that $1,500,000 is its fair value.

The manner in which any sensible business man would arrive at the value of the plant of the Water Company would be to add up the values of the various items of tangible property such as pipe, machinery, buildings, lands, etc.. and then add to this reasonable amounts for the intangible property such as going value, interest during construction, etc. This total would represent the value of the property. This is precisely the method followed by the Commission in reaching its estimate of fair value except that it erred by excluding the five elements of value directed to be added by the

Superior Court, to which we have already referred. If it be argued that the Commission did not reach its estimate of fair value by adding up the various items, we reply that the Commission's report demonstrates that such an argument is unsound. We say this, first, because the Commission's figure of value is precisely $924,744, not $925,000 or any other approximated amount; second, because the Commission distinctly says that it *did* add up the various items, using the following language (R. Vol. I, p. 38):

> "The Commission has reached the conclusion that the *aggregate* fair value of *all the items* set forth in the said summary of audits and appraisements which have been allowed and which comprise the entire property of respondent that is used and useful in the public service it is now rendering to the several municipalities served by it, is nine hundred and twenty-four thousand, seven hundred and forty-four dollars ($924,744.00) and that sum is the basis upon which its rate of fair return should be computed."
>
> (The italics are ours.)

It is well settled that the return to the Water Company is to be calculated upon the *present value* of its property. In *Willcox et al vs. Consolidated Gas Co.*, 212 U. S., 19 (1909), which was a rate case, this Court used the following language upon this point (p. 52):

> "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of

rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

In *The Minnesota Rate Cases*, 230 U. S., 352 (1913) this Court said (p. 434):

"(1) The basis of calculation is the 'fair value of the property' used for the convenience of the public. *Smyth vs. Ames, supra* (p. 546). Or, as it was put in *San Diego Land & Town Co. vs. National City, supra* (p. 757), 'What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public.' See also *San Diego Land & Town Co. vs. Jasper, supra; Willcox vs. Consolidated Gas Co., supra.*

(2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judg-

ment having its basis in a proper consideration of all relevent facts."

and again (p. 454):

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

The citation of further authorities upon this point is unnecessary. We may say, however, that in *City of Ashland vs. Ashland Water Co.*, 4 Wis. R. R. Commission Reports, 273 (1909), also a rate case, the Wisconsin Commission held (pp. 305-306) that the present value of land *originally donated by the municipality to the Water Company should be included in the value of the plant.*

We have shown above (p. 168) that the plaintiff in error is entitled to the benefit of the decree of the Superior Court as the result of the only judicial review of the Commission's order in this case. We submit that we have shown also that the conclusions of the court as to the value of the plaintiff in error's property should be sustained in any event as intrinsically correct.

HEADING V.

INASMUCH AS THE COMMISSION PLACED TOO LOW A VALUE UPON THE PROPERTY, THE RETURN ALLOWED BY IT IS CONFISCATORY.

The Commission held that the Water Company is entitled to a gross annual revenue of $135,167.66 upon the valuation fixed by it (said annual revenue, including operating expenses of $63,500.00 and depreciation of $6,935.58 as well as return on capital) and in figuring this gross annual revenue it found that the Water Company is entitled to a fair annual return of 7 per cent upon the value of its property over and above operating expenses and depreciation (R., Vol. 1, pp. 40, 39). The Commission found the value of the property to be $924,744 (R. Vol. I, p. 38) and, therefore, found the fair annual return of 7 per cent to be $64,732.08 (R. Vol. I, p. 39). Upon the sum of $1,324,621.80, which is the value of the property under the Superior Court's opinion, the fair annual return of $64,732.08 allowed by the Commission is about 4.88 per cent. This, we submit, is plain confiscation. In the case of *City and County of Denver et al. vs. Denver Union Water Co.*, 246 U. S., 178 *supra*, this court held (p. 194) that a return of 4.2812 per cent. per annum was clearly inadequate and amounts to a taking of property without due process in violation of the Fourteenth Amendment. In *Willcox et al. vs. Consolidated Gas Co.*, 212 U. S., 19, it was held that 6% per annum was an adequate return

for a gas company in New York City. But in that case the court took into consideration the fact that the corporation in question "monopolizes the gas service of the largest city in America and is secured against competition" and that its business is "the most favorably situated gas business in America" (p. 49). It further appeared (p. 48) that an amount of almost $8,000,000 was included in the valuation of the property as "franchise value."

This case differs from every other case which has been before this court because *in this case this court has the benefit of a finding which specifies the rate per cent. which the Water Company is entitled to receive on the value of its property.* The Commission's finding on this point is as follows (R. Vol. I, p. 40):

> "6. The respondent is entitled to have a rate of return upon the fair valuation of its property used and useful as herein found, of 7% over and above its necessary annual operating expenses and a proper allowance for depreciation."

The Commission's finding as to the rate per cent. of return to which the Water Company is entitled was affirmed by both the Superior Court and the Supreme Court of Pennsylvania. While the Superior Court reversed the Commission in the matter of the valuation of the property, it expressly approved the 7 per cent. rate of return fixed by the Commission, the Superior Court using the following language on this point (R., Vol. I, p. 106):

> "The order of the Commission is reversed and it is directed to reform its valuation in accordance

with this opinion and upon such valuation it shall fix a schedule of rates which shall cover the expenses, depreciation, etc., and *the return per cent as found by the Commission to be fair.*"

(The italics are ours).

The Supreme Court of Pennsylvania reinstated the Commission's order in its entirety which, of course, includes the 7 per cent rate of return. In all the other rate cases which have been before this court there were merely certain rates of charges fixed or a certain revenue allowed, and, when the question of confiscation was raised, it was necessary for this court to determine (a) what was the fair value of the property, (b) what rate per cent. of return on the fair value of the property the revenue allowed by the Commission or court below would produce, and (c) after the fair value of the property had been determined, whether this rate per cent. of return would be confiscatory. This court is relieved from passing upon questions (b) and (c) above and the only question necessary to be determined by this court is whether the Commission's valuation of the property is not too low. The Commission, having fixed 7 per cent. as the rate per cent. of return, proceeded to apply this rate to the value of the property as found by it and, therefore (R. Vol. I, p. 39) fixed the precise amount of $135,167.66 as the gross annual revenue of the company, including both operating expenses, depreciation and the said return of 7 per cent. upon the value of the property. If, therefore, the 7 per cent. rate of return stands and the valuation of the property is too low, the fact of confiscation is demonstrated. Of course, it must be assumed that the Pennsylvania Public Service Commission desires to see justice done in this case and,

if it has erred in its finding as to the fair value of the property, desires that its order be corrected. He would be a poor friend of the Commission who should argue that, if the Commission has erred by placing too low a value on the property, its order should, nevertheless, be upheld by reducing the 7 per cent rate of return which the Commission has held the Water Company is entitled to receive. While the defendants in error are not necessarily concluded by the findings of the Commission and the two Pennsylvania courts on this question of the 7 per cent rate of return, yet, as a practical question, we submit, that under the evidence and in view of the hazards to which the Water Company is subjected the counsel for the defendants in error will be wholly unable to induce this court to overturn this finding. On the question of evidence as to the fair rate of return, Mr. Chester testified (R. Vol. II, p. 709) that, in addition to operating expenses and depreciation, the company is entitled to a fair return of at least 8 per cent. upon the value of its property. Mr. Knowles testified (R. Vol. II, p. 848) to 7 per cent. Mr. Hudson, a witness for the defendant in error, (R. Vol. II, p. 643) testified to 6 per cent. In view of the evidence in the case and the admitted facts concerning the risks to which the company is subjected, we submit that the finding as to the 7 per cent. rate of return is undoubtedly correct. On account of the location of its pumping plant and water supply on an island in the Ohio River, the Water Company is exposed to unusual hazards. Both its mains crossing the Ohio River to the North Side boroughs were broken at one time through accidents in the year 1915 (Sloane, R., Vol. I, p. 471). By reason of this occurrence, the company sustained a loss of approximately $22,000.

The breaking of these pipes is something that may happen at any time. The unusual hazards of this location are commented upon in the dissenting report of Commissioner Rilling, who said (R., Vol. I, p. 77):

> "The respondent, like all other public utilities, is subject more or less to certain unprotected and uninsurable risks and hazards which should be carefully considered in determining its fair return.
>
> The respondent is maintaining two large mains under the Ohio River with their accompanying dangers and with the possibility of their being entirely destroyed from one cause or another, and thus interrupt its service and cause it great expense. This has already occurred and may occur again. The location of the pumping station of respondent should be considered. It is located at the head of an island in the middle of a large river. Under ordinary circumstances it is elevated to such an extent as to be free from danger. Should there, however, be an extraordinary flood, this entire pumping station might be swept away. It has other risks, but these are sufficient to indicate that at least to some extent the safety and permanency of the investment in respondent's plant may be jeopardized, and should all be considered in determining its fair rate of return."

On account of the risks and hazards to which the Water Company is subjected, Commissioner Rilling held (R., Vol. I, p. 78) that a fair rate of return over and above operating expenses and depreciation should be not less than 7½ per cent. For the purposes of this case, however, we accept the 7 per cent. rate of return

fixed by the Commission and the two Pennsylvania courts, as stated above, and we do not ask for a rate per cent. of return in excess of 7 per cent.

Further, the company has no monopoly or exclusive franchise. Article III, Section 3 of the Pennsylvania Public Service Company Law is as follows (Pamphlet Laws of 1913, p. 1388—Purdon's Digest, 13th Edition, Vol. 6, pp. 7213-7214):

> "Upon like approval of the Commission first had and obtained as aforesaid and upon compliance with existing laws and not otherwise, it shall be lawful * * *
>
> (d) For any municipal corporation to acquire, construct, or begin to operate any plant, equipment or other facilities for the rendering or furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality."

The foregoing section ends any claim of a water company to an exclusive franchise. Under the law the Commission may allow any of these municipalities to operate plants and supply water by lines paralleling those of the Water Company. While such action may not be likely at the present time no one can foretell what will occur in the future and this is a real risk to which the Company is subjected.

In connection with the return which should be allowed, in *Lincoln Gas & Electric Light Co. vs. City of Lincoln,* 39 Supreme Ct. Rep., 454 (decided June 2,

1919), this court, speaking by Mr. Justice Pitney, said (p. 458):

> "It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future."

Inasmuch as the Commission fixed the gross annual revenue of the Water Company at $135,167.66, this is not a case where there should be a test of the rates to see whether they will prove confiscatory as was done in *Willcox et al. vs. Consolidated Gas Co.*, 212 U. S., 19 (see pp. 42, 54-55); *Northern Pacific Ry. Co. vs. State of North Dakota*, 216 U. S., 579 (see p. 581), and *Des Moines Gas Co. vs. City of Des Moines*, 238 U. S., 153 (see pp. 172-173), in which cases the gross annual revenue was not fixed but certain rates were prescribed.

HEADING VI.

THERE ARE NO FINDINGS OF FACT ADVERSE TO THE WATER COMPANY WHICH ARE BINDING UPON THIS COURT.

(It is not necessary to argue that this court will not be bound by the conclusions of law of another tribunal.)

We respectfully request your Honors particularly to note that *there are absolutely no findings of fact made in this case by the Supreme Court of Pennsylvania.* The Supreme Court of Pennsylvania merely held that there was substantial evidence to support the findings of the Commission and that, therefore, no court had the power to reverse those findings. We have endeavored to show under previous portions of this argument that, with respect to the five elements of value directed to be added by the Superior Court, the findings of the Commission are *not* based upon substantial evidence. If the argument we have made on this point is sound, then there is no room to apply *to the Commission's findings* the rule as to the weight to be given to the findings of fact of a state court. On the contrary, that rule should be applied to the findings of the *Superior Court of Pennsylvania.* In other words, the Pennsylvania Public Service Company Law gives the right of appeal from the Commission to the Superior Court. That court decided the facts as to the five added elements of value. The Pennsylvania Supreme

Court only limited the powers of the Superior Court in finding the facts if the Commission's findings were based upon *substantial* evidence. If the Commission's said findings were not based upon substantial evidence, the limitation on the powers of the Superior Court disappears. In that event, the Superior Court has the right itself to proceed to find the facts according to the evidence and this it did. We believe we have shown that the Commission's findings with respect to the five added elements of value are not supported by substantial evidence, and we submit, therefore, that the findings of fact of the Superior Court of Pennsylvania should be upheld. The Superior Court corrected the Commission's erroneous conclusions of law with respect to the five elements of value and the Superior Court's findings as to those elements are findings of fact based upon correct legal conclusions. They should, therefore, be given the weight ordinarily given by this court to the findings of fact of a state court. In this connection, it should be observed that the Superior Court is not obliged to express its findings in any particular form or manner. The same principle applies to the decision of the Superior Court as was applied by the Circuit Court of Appeals of the Second Circuit in *Lehigh Valley Railroad Co. vs. American Hay Co.*, 219 Fed., 539 (1914), in which it was held in an opinion by Judge Lacombe that the Interstate Commerce Commission is not required to make any formal, marked and numbered findings, but that its findings may be contained in the colloquial statements of the opinion. But even assuming that this court will apply to the Commission's findings in this case, the rule as to the weight to be given to the findings of fact of a state

court, we submit that, with respect to the said five added elements of value, the Commission's findings are within the well settled exceptions to the rule. This court has repeatedly held that it will not be bound by the findings of any court where the findings are either—

(1) Findings of fact without any evidence to support them, or

(2) Findings in which a conclusion of law and findings of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts.

It is not necessary to cite authorities to the effect that this court will not be bound by the conclusions of law of any Court or Commission. So far as concerns the question of findings of fact without evidence or findings which are composite of fact and law, the rule stated is well settled. Among the numerous authorities on the subject we cite the following:

In *Kansas City Southern Railway Company vs. C. H. Albers Commission Co.*, 223 U. S., 573 (1912), upon a writ of error, the Supreme Court of Kansas was reversed. The case involved the right of recovery from an interstate carrier of the difference between contract rates and the rates actually charged and the validity, under the interstate commerce laws, of the rates contracted for. In that case this court, speaking by Mr. Justice Van Devanter, said (p. 591):

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of

law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

The court then proceeded to cite a number of cases in which the Supreme Court had reviewed findings of state courts on the evidence.

In *Cedar Rapids Gas Light Co. vs. Cedar Rapids*, 223 U. S., 655 (1912), upon a writ of error, the decree of the Supreme Court of Iowa was affirmed. In that case a bill in equity was filed under the contract and due process provisions of the Constitution of the United States to restrain the enforcement of an ordinance of the City of Cedar Rapids fixing the price of gas at ninety cents per thousand cubic feet. This court, speaking by Mr. Justice Holmes, said (pp. 668-669):

"But of course findings either at law or in equity may depend upon questions that are re-examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions properly saved must be answered, and, so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues,

the evidence will be examined. *Kansas City Southern Railway Co. vs. Albers Commission* Co., decided February 26, 1912, *ante*, p. 573. For instance in this case the finding of the court that it was not prepared to say that a ninety cent rates was confiscatory may perhaps be taken to have been made subject to the admission that the rate was too low to permit a discount for prompt payment, and if so opens the question whether it was not confiscatory on that account, as matter of law. The plaintiff presents a number of such objections to the decision of the court below, although confused with arguments on pure matter of fact."

In *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S., 510 (1911), the railroad commission of the State of Washington ordered certain track connections. The railroad company attacked the order by petition for review in the Superior Court of Thurston County, which entered a judgment dismissing the petition and this judgment was affirmed by the judgment of the Supreme Court of the State of Washington, the case being then taken to this court by writ of error on the ground that the railroad's property was being taken without due process. This court reversed the judgment. In that case this court, speaking by Mr. Justice Lamar, said (pp. 523-524):

"The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be

laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago &c. Ry. vs. Chicago,* 166 U. S., 226, 236; *Missouri Pacific Ry. vs. Nebraska,* 164 U. S., 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago &c. R. R. vs. Minnesota,* 134 U. S., 418; *Smyth vs. Ames,* 169 U. S., 466; *Chicago &c. R. R. vs. Tompkins,* 176 U. S, 167, 173."

Again (p. 528):

"That being so, it leaves for consideration the contention that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence,

not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in *Kansas City Railway Co. vs. Albers Commission Co.,* 223 U. S., 573, 591, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.' *Cedar Rapids Gas Light Co. vs. Cedar Rapids,* 223 U. S., 655; *Graham vs. Gill,* 223 U. S., 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property."

In *Creswill vs. Knights of Pythias,* 225 U. S., 246 (1912), upon a writ of error, the judgment of the Supreme Court of Georgia was reversed. The question involved was the right of two associations to use the name "Knights of Pythias" and to be incorporated thereunder in one of the states. In that case this court, speaking by Mr. Chief Justice White, said (pp. 261-262):

"While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (b) that where a conclusion of law as

to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. *Kansas City So. Ry. Co. vs. Albers Comm. Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids, Ib.*, 655, 668; *State of Washington ex rel. vs. Fairchild*, 224 U. S., 510. The contentions here made bring this case under the first category, since the insistence here is that there was not any evidence justifying the findings made by the Court concerning the fraudulent purpose, injury to property, deception of the public, etc."

Southern Pacific Co. vs. Schuyler, 227 U. S., 601 (1913), involved the liability of an interstate railway carrier for personal injuries sustained by railway mail service clerk traveling without the payment of fare, and the construction of the anti-pass provisions of the Hepburn Act. The judgment of the Supreme Court of the State of Utah was brought before this court on a writ of error and affirmed. In that case this court, speaking by Mr. Justice Pitney, said (pp. 611-612):

"• • • While it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence

may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co. vs. Albers Commission Co.*, 223 U. S., 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids*, 223 U. S., 655, 668; *Creswill vs. Knights of Pythias*, 225 U. S., 246, 261. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Accepting the duty to review this question of fact, we have examined the evidence in the record and find that it fairly supports the conclusion of the state court that the deceased was accepted by plaintiff in error as a gratuitous passenger."

In *St. Louis, Iron Mountain & Southern Ry. Co. vs. McWhirter*, 229 U. S., 265 (1912), a judgment of the court of appeals of the State of Kentucky was brought before this court on a writ of error and reversed. The case involved the question of the liability of a railroad company for damages for personal injuries under the Hours of Service Act of 1907. In that case this court, speaking by Mr. Chief Justice White, said (p. 277):

"While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat., Sec. 709, yet where in a controversy of a purely Federal character the

claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. Ry. vs. Albers Commission Co.*, 223 U. S., 573, 591; *Creswill vs. Knights of Pythias*, 225 U. S., 246."

In *North Carolina R. R. Co. vs. Zachary*, 232 U. S., 248 (1914), a judgment of the Supreme Court of North Carolina was brought before this court on a writ of error and reversed. The case was an action to recover damages for the negligent killing of a locomotive fireman and involved the construction of the Employers' Liability Act of 1908. In that case this court, speaking by Mr. Justice Pitney, said (pp. 258-259):

"But it is now insisted that there was no evidence tending to show that deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. *Southern Pacific Co. vs. Schuyler*, 227 U. S., 601, 611, and cases cited."

In *Carlson vs. Curtis*, 234 U. S., 103 (1914), the plaintiff in error was adjudged by the Superior Court of Thurston County, in the State of Washington, to be in contempt because, in violation of the decree of the court, he blew out an embankment at the head of Lake Washington Canal. The Supreme Court of the State

of Washington affirmed the judgment and the judgment of the latter court was brought before this court upon a writ of error and affirmed. In that case this court, speaking by Mr. Justice Pitney, said (p. 106):

> "While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a Federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, necessary for a decision of a Federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right. *Southern Pacific Co. vs. Schuyler,* 227 U. S., 601, 611, and cases cited."

In *Northern Pac. Ry. Co. vs. North Dakota,* 236 U. S., 585 (1915), the judgments of the Supreme Court of North Dakota were reversed in this court on writs of error on the ground that property was taken thereby without due process. The case involved a statute of North Dakota fixing maximum intrastate rates for the transportation of coal by railroad companies. In that

case this court, speaking by Mr. Justice Hughes, said (p. 593):

> "This court will review the findings of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Kansas City Southern Ry. vs. Albers Commission Co.*, 223 U. S., 573, 591; *Creswill vs. Knights of Pythias*, 225 U. S., 246, 261; *Wood vs. Chesborough*, 228 U. S., 672, 678."

In *Norfolk & Western Railway Co. vs. West Virginia*, 236 U. S., 605 (1915), the judgment of the Circuit Court of Kanawha County, West Virginia, was reversed by this court on writ of error on the ground that the two cent fare law of West Virginia was a deprivation of property without due process. In that case this court, speaking by Mr. Justice Hughes, said (pp. 609-610):

> "So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of fact which is set forth in the decree of the state court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter. *Kansas City Southern Ry. vs. Albers Com-*

mission Co., 223 U. S., 573, 591; *Cedar Rapids Gas Co. vs. Cedar Rapids*, 223 U. S., 655, 668, 669; *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S., 510, 528; *Creswill vs. Knights of Pythias*, 225 U. S., 246, 261; *Southern Pacific Co. vs. Schuyler*, 227 U. S., 601, 611; *Wood vs. Chesborough*, 228 U. S., 672, 678."

In *Interstate Amusement Co. vs. Albert*, 239 U. S., 560 (1916), the judgment of the Supreme Court of Tennessee was brought before this court by a writ of error and affirmed. The case involved the right of a Missouri corporation to sue upon a contract in the courts of the State of Tennessee, the court having dismissed the case on the ground that the corporation had failed to comply with the statute of Tennessee relating to foreign corporations doing business in that state. This court, speaking by Mr. Justice Pitney, said (pp. 566-567):

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution are binding upon this court. *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 86, 97; *Rankin vs. Emigh*, 218 U. S., 27, 32; *Miedreich vs. Lauenstein*, 232 U. S., 236, 243. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal right has been denied as the result of a finding that is without support in the evidence. *Southern Pacific Co. vs. Schuyler*, 227 U. S., 601, 611; *North Carolina R. R. vs. Zachary*, 232 U. S., 248, 259; *Carlson vs. Washington*, 234 U. S., 103, 106."

HEADING VII.

THIS COURT WILL DETERMINE FOR ITSELF WHETHER THERE HAS BEEN A CONFISCATION OF PROPERTY.

In *Home Telephone Company vs. Los Angeles,* 211 U. S., 265 (1908), a bill in equity was filed in the Circuit Court of the United States by the appellant, a telephone company, against the City of Los Angeles and its officers to restrain the enforcement of certain ordinances fixing the rates to be charged for telephone service, etc. The defendants demurred to the bill, the demurrer was sustained and an appeal was taken to this court, which affirmed the decree of the court below. This court was careful to point out in its opinion (p. 281) "that there is no suggestion in the case at bar that the rates actually fixed were so low as to operate as a practical confiscation of property." This court, speaking by Mr. Justice Moody, said (p. 278):

> "It must not be forgotten that, presumably, the courts of the States, and *certainly the courts of the United States,* are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that *the latter courts will, under all circumstances, determine for themselves* whether such confiscation exists." (The italics are ours.)

In *Oregon R. R. & N. Co. vs. Fairchild,* 224 U. S., 510 (1911), *supra,* the railroad commission of the

State of Washington ordered certain track connections. The railroad company attacked the order by petition for review in the Superior Court of Thurston County, which entered a judgment dismissing the petition and this judgment was affirmed by the judgment of the Supreme Court of the State of Washington, the case being then taken to this court by writ of error on the ground that the railroad's property was being taken without due process. This court reversed the judgment. In that case this court, speaking by Mr. Justice Lamar, said (pp. 523-524):

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago &c. Ry. vs. Chicago,* 136 U. S., 226, 236; *Mis-*

souri Pacific Ry. vs. Nebraska, 164 U. S., 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago, &c. R. R. vs. Minnesota,* 134 U. S., 418; *Smyth vs. Ames,* 169 U. S., 466; *Chicago, &c. R. R. vs. Tompkins,* 176 U. S., 167, 173."

Again (p. 528):

"That being so, it leaves for consideration the contention that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in *Kansas City Railway Co. vs. Albers Commission Co.,* 223 U. S., 573, 591, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.' *Cedar Rapids Gas Light Co. vs. Cedar Rapids,* 223 U. S., 655; *Graham vs. Gill,* 223 U. S., 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property."

The Minnesota Rate Cases, 230 U. S., 352 (1912), involves the validity of the orders of the Railroad and Warehouse Commission and the legislative acts of the State of Minnesota prescribing maximum rates for freight and a maximum fare of two cents a mile for passengers. The rates were claimed to be confiscatory. The cases came before this court from appeals from the Circuit Court of the United States for the District of Minnesota. In that case this court, speaking by Mr. Justice Hughes, considered the questions of fact at great length. In the cases of the Northern Pacific and Great Northern Companies the rates were sustained by this court, but in the case of the Minneapolis & St. Louis R. R. Co. (pp. 469-473), the rates were held to be confiscatory by this court and the decree of the court below was accordingly modified. In these *Minnesota Rate Cases* this court said (p. 433):

> "The rate-making power is a legislative power and necessarily implies a range of legislative discretion. We do not sit as a board of revision to substitute our judgment for that of the legislature, or of the commission lawfully constituted by it, as to matters wihin the province of either. *San Diego Land & Town Co. vs. Jasper,* 189 U. S., 439, 446. The case falls within a well defined category. Here we have a general schedule of rates, involving the the profitableness of the intrastate operations of the carrier taken as a whole, and the inquiry is whether the State has overstepped the constitutional limit by making the rates so unreasonably low that the carriers are deprived of their property without due process of law and denied the equal protection of the laws."

In *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S., 585 (1915), *supra*, the judgments of the Supreme Court of North Dakota were reversed in this court on writs of error on the ground that property was taken thereby without due process. The case involved a statute of North Dakota fixing maximum intrastate rates for the transportation of coal by railroad companies. In that case, this court, speaking by Mr. Justice Hughes, said (pp. 598-599):

> "The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. *San Diego Land & Town Co. vs. Jasper*, 189 U. S., 439; *Louisville & Nashville R. R. vs. Garrett*, 231 U. S., 298, 313. The court, therefore, is not called upon to concern itself with mere details of a sched-

ule; or to review a *particular tariff or schedule* which yields substantial compensation for the services it embraces, *when the profitableness of the intrastate business as a whole is not involved.*

But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted."

(The italics are ours.)

Norfolk & Western Ry. Co. vs. West Virginia, 236 U. S., 605 (1915), *supra.* The judgment of the Circuit Court of Kanawha County, West Virginia, was reversed by this court on writ of error on the ground that the two cent fare law of West Virginia was a deprivation of property without due process. In that case this court, speaking by Mr. Justice Hughes, said (p. 608):

"The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern Pacific Railway vs. North Dakota,* decided this day (*ante,* p. 585), makes an extended discussion of this question unnecessary. It was recognized that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not neces-

sary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the State has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.

These considerations are controlling here. The passenger traffic is one of the main departments of the company's business; it has its separate equipment, its separate organization and management, and of necessity its own rates. In making a reasonable adjustment of the carrier's charges, the State is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the State may not select either of these departments for arbitrary control. Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear

to be outside the field of reasonable adjustment that the State should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost. That fact, *satisfactorily proved,* would be sufficient to rebut the presumption of reasonablenesss; and if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear. *Northern Pacific Railway vs. North Dakota, supra,* and cases there cited."

In *Great Northern Ry. Co. vs. Minnesota,* 238 U. S., 340 (1914), on a writ of error the judgment of the Supreme Court of Minnesota was reversed by this court. The question involved was as to the power of a state railway commission to require a carrier to erect weighing scales at stations. This court, speaking by Mr. Justice McReynolds, said (p. 345):

"The applicable principles were announced in *Oregon Railroad, &c., Co. vs. Fairchild,* 224 U. S., 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the

mere declaration of a commission is not conclusive."

In *Union Pacific Railroad Co. vs. Public Service Commission of Missouri*, 248 U. S., 67 (1918), upon a writ of error the judgment of the Supreme Court of Missouri was reversed by this court. The case involved a fee imposed by the Missouri Commission upon an issue of bonds, which fee it was claimed was an interference with interstate commerce and also a violation of the Fourteenth Amendment. This court, speaking by Mr. Justice Holmes, said (pp. 69-70):

> "The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived."

In a number of decisions of this court to which we have referred rates established by the state legislatures, or by commissions exercising this legislative function, were overturned by this court as being confiscatory. In none of these cases does this court hold that its action depends upon the question merely whether there is substantial evidence to support the findings of a commission, but the question was disposed

of in this court in accordance with the *weight of the evidence*, considering the evidence on both sides of the case. It is quite true that in cases, such for example as *Interstate Commerce Commission vs. Union Pacific R. R. Co.*, 222 U. S., 541, involving a rate on lumber between given points or similar legislative matters this court has said that it would uphold the findings of a commission if supported by substantial evidence. But this court has never announced any such principle in dealing with a case in which the entire revenue of a public service company was fixed in dollars and cents by the order of a commission.

HEADING VIII.

THE SITUATION IN PENNSYLVANIA AS A RESULT OF THE DECISION IN THE CASE AT BAR.

To show the state of affairs in Pennsylvania by reason of the decision in the case at bar and the great injustice which has resulted therefrom, not only to the Ohio Valley Water Company, but to other property owners, rendering the situation almost intolerable on account of the confiscation of property, we respectfully refer this court to the decision of the Superior Court of Pennsylvania in the later case of *Beaver Valley Water Company vs. Public Service Commission,* 71 Pa. Superior Court Rep., 43 (1919). In the Beaver Valley case the Superior Court held that the Commis-

sion had treated the company unjustly by not allowing it the value of its property in a rate case but that the court was powerless to help the Company in view of the decision of the Supreme Court of Pennsylvania in the case at bar. For the convenience of the court we are printing as an appendix to this brief the entire opinion of the Superior Court of Pennsylvania in the Beaver Valley Water Company case.

We respectfully submit that the existing situation in Pennsylvania amounts to nothing less than a denial of justice in these rate cases. The plaintiff in error and its stockholders are not only citizens of Pennsylvania, but they are citizens of the United States. They have exhausted their legal remedies in Pennsylvania and apply to this court, as their last resort, in the confident belief that your Honors will not permit their property to be confiscated.

HEADING IX.

THE FINDINGS OF THE COMMISSION AS TO THE COST OF THE WATER COMPANY'S PROPERTY ARE INCORRECT AND MISLEADING.

The figures representing the cost of the property, as found by the Commission, is by no means the true *historical* cost of the property. The figure found represents only partial and incomplete *book cost*. But book cost is not the actual cost. Books of a water company started twenty years ago are bound to be incomplete because scientific bookkeeping with proper entries for future valuations of the property in rate making was unknown at that time. On this point it is the uncontradicted evidence of Mr. Knowles, a witness with large experience in these matters (R., Vol. II, pp. 846-847) that historical cost and book cost are very infrequently the same, the reason being that book records are usually incomplete. The Ohio Valley Water Company is no exception to the rule. The reports made by the auditors of the defendants in error (Exhibit 19, R., Vol. II, p. 896) and the Water Company's auditors (Exhibit "Q," R., Vol. II, p. 1057) show that the books and records of the Water Company are incomplete as was to be expected. For example, in Exhibit 19 (R., Vol. II, p. 900), it appears that all the receipts of the Bellevue Water Company, the Riverview Water Company and the Valley Consolidated

Water Company were deposited in a single bank account. Furthermore, the Commission has failed to give the company credit for even so much of the actual cost of the property as is disclosed by the books. There are many items of actual cost which the Commission has either totally or partially excluded from its cost figure in the case at bar. Without unduly extending this argument, we cannot go into each one of these items. We believe, however, that we can show your Honors that the Commission's finding as to the cost of the property is inaccurate and misleading by referring to three or four points indicating the Commission's handling of this subject.

1. The Commission in its report on petition for rehearing (R., Vol. I, p. 60) finds the cost of the property to be $841,343. To that amount it adds $10,000 working capital and deducts $68,149 depreciation, leaving the cost, less depreciation, as of September 30, 1915, $783,194. *But depreciation has nothing to do with cost and no such deduction should be made.* If the Commission were attempting to find the *reproduction* cost of the property, depreciation should properly be charged, but we are here dealing with what the Commission says is *actual cost.* If the Commission means to intimate that the *actual cost* represents the *value* of the property, it would be more in accordance with the facts if the Commission had pointed out in this connection that the appreciation in the Company's real estate and the failure of the Commission to include the actual amount of interest during construction far more than offset the depreciation which the Commission endeavors to deduct from its figures of actual cost.

2. If your Honors will examine the Commission's schedule purporting to show the actual cost of construction (R., Vol. I, p. 54—original p. 109) you will find that every dollar of the total cost of $841,343 is for purely *tangible* property except the following two items:

(a) $7,659 for charter and franchise.

(b) $21,614 for interest during construction.

Referring to the last item it is plain that interest during construction is an item of actual cost. It is money actually expended by the company. We have shown in a previous portion of this argument (*ante*, p. 212) that, under the agreement of the engineers for both sides that the construction period would cover two and one-half years, the amount actually paid for interest during construction would be $42,902 as found by the Commission (on the basis of a construction period of only a year and a half) plus $28,601.33 (representing the additional year's interest which the Commission should have allowed) or a total of $71,503.33. Inasmuch as the Commission in its figure of cost allows only $21,614 for interest during construction there should be an addition of $49,889.33 to show the actual cost of this item. This is a good illustration of the fact that the partially incomplete book cost is not the true historical cost of the property of the Water Company. Neither on the books of the Water Company nor of any of the companies purchased by it is there a single entry referring specifically to interest during construction. In Exhibit "Q" of the Reckitt & Company Report, on the sheet entitled Exhibit "B" (R., Vol. II, p. 1057—

original p. 1879 a—in the 20th and 21st lines—last column) are shown items of interest on bonds $20,750 and interest on notes $864.23. These two items combined make $21,614 and are only a small part of the amount of interest during construction actually paid out by the Water Company. The reason that items such as interest during construction, compensation to the organizers for consolidating the properties into a single operating unit, etc., are not properly shown on the books of the companies is that they were included in the stocks and bonds issued in connection with the financing and purchases of the Ohio Valley Water Company and its predecessors. The organizers who had to bear these expenditures and to devote their time to consolidating the properties, received compensation therefor in the price paid to them in stocks and bonds although no attempt was made to separate the items on the books.

In this connection, Mr. Sloane testified, in substance (R., Vol. II, p. 652), that the organizers of the Company gave a great deal of time to getting the property together and received no compensation for their services except such as is indicated on the Company's books represented by cash and *stock*. Mr. John M. Hastings also testified (R., Vol. II, p. 831) to the large amount of time and effort devoted by the organizers to the organization of the Ohio Valley Water Company and its predecessors. The Commission, however, absolutely excluded from its figures in this case every dollar of either cost or value paid or represented by the issue of stock and bonds, and thereby the Commission was guilty of an act of great injustice to this company.

3. We ask your Honors to note how the Commission treated the Hastings contract. The Commission finds (R., Vol. I, p. 58) that the cost of the work performed by Mr. Hastings, or his sub-contractor, was $146,425.94. For this the company paid Hastings cash $6,425.94, bonds $140,000, stock $140,000. The Commission then proceeds to find that this payment is $140,000 in excess of the cost and excludes this entire $140,000 of so-called excess cost using the following language (R., Vol. I, p. 58):

> "The amount of the actual cost is included in the proper subdivisions in items one to sixteen in the above statement. The amount of those excess payments are clearly not proper charges to investment account, and in the opinion of the Commission should be excluded from the statement of original cost of construction."

The cost of the work under the Hastings contract as shown by the report of the auditors for the defendants in error, which report is referred to by the Commission, will be found in the Record, Vol. II, pp. 953-954, 967-968, and schedule No. 5A, p. 968—original p. 1735 a. If your Honors will look at the said schedule No. 5A, you will find that not a dollar is included for Mr. Hastings' time and trouble, nor for the right of way. It is the uncontradicted evidence of Mr. Sloane (R., Vol. I, pp. 484-485) in substance, that the expenditure made by the company in the Hastings contract did not include anything for the right of way and that Mr. Hastings procured the right of way at his own expense, which included crossings under the main tracks of the Pittsburgh, Cincinnati, Chicago & St

Louis Railroad and the Pittsburgh & Youghiogheny Railroad. It may be that in receiving $140,000 in par value of stock of the Water Company Mr. Hastings was, to some extent, overpaid, but it is certain that the Commission by excluding this entire $140,000 of stock from the cost of the property has arbitrarily excluded a portion of the actual cost of the Company's property.

4. One of the astonishing things about the supplemental report of the Commission is that the *cost* of the Monongahela water system is put by the Commission at $17,257 (R., Vol. I, pp. 56-57, 54—original p. 109, line 17). We are wholly at a loss to understand how such a finding could have been made. The way the Commission reaches this remarkable result is by asserting (R., Vol. I, p. 56) that the pipe lines of the company in McKees Rocks, Stowe Township and Chartiers Township, together with certain cash and accounts receivable, were sold to the Ohio Valley Water Company for $30,000. But this was not the amount really paid by the Ohio Valley Water Company for this property. The real purchase of this property was made when the Water Company, on May 6, 1913, purchased 97 per cent. of the capital stock of the Monongahela Company and paid therefor $100,000 in notes of the Ohio Valley Water Company and $192,450 of the capital stock of the latter (R., Vol. I, p. 55). With respect to this Monongahela Water Company transaction the following points should be noted:

(a) *The parties dealt at arm's length*:

While the proposition for the sale of this stock was in form made by Mr. Haas to the Ohio Valley

Water Company, in fact it was made to carry out the purchase of the stock from Messrs. Haas and McCune under negotiations initiated by the Ohio Valley Water Company acting by Mr. John M. Hastings, its then president, which negotiations were opened by Mr. Hastings with Mr. McCune (R., Vol. II, pp. 831-832). This stock had been purchased by Mr. Haas (representing Mr. McCune and himself) from the stockholders of the Monongahela Water Company (R., Vol. II, pp. 602, 603). The Commission finds (R., Vol. I, p. 55) that the net price paid by Mr. Haas for this stock was a little over $60,000. At the time of the purchase of the stock by Mr. Haas from the stockholders of the Monongahela Water Company and at the time of the sale of same to the Ohio Valley Water Company, Mr. Haas was not a director or officer of the Ohio Valley Water Company and was not interested in the company either as a stockholder or otherwise (R., Vol. II, p. 602). Mr. McCune had 1,300 shares of stock in the Ohio Valley Water Company (R., Vol. II, p. 1009—original p. 1805 a, last column, fourth line), which was less than 9 per cent. of its outstanding stock, and Mr. McCune was neither an officer or director in the Ohio Valley Water Company (R. Vol. II, p. 603).

(b) *The condition of the Monongahela Water Company and the bargain secured by Mr. Haas in the purchase of 97 per cent. of its stock.*

Mr. F. B. Beech was the secretary and treasurer and general manager of the Monongahela Water Company (R., Vol. II, pp. 671-672). It was the uncontradicted evidence of Mr. Beech that in 1909 about 75 per

cent. of the property of the Monongahela Company had been purchased by the City of Pittsburgh (R., Vol. II, p. 675). The Company had outstanding over 100,000 shares of stock and there were 650 stockholders scattered all over the United States (Mr. Beech, R., Vol. II, p. 692; Mr. Haas, R., Vol. II, p. 604). The company was already in process of liquidation and the money received from the City of Pittsburgh had been distributed as liquidating dividends among the stockholders. It was evident, therefore, that this unwieldy company would have to be completely reorganized and some money expended to put it in proper shape for continuing business. It was the uncontradicted evidence of Mr. Beech (R., Vol. II, pp. 675 and 692) that the owners of the stock at the time of the Haas purchase were tired of their holdings and wanted to get rid of them. Mr. Haas, therefore, had an opportunity to get a rare bargain, of which he properly took advantage. Mr. Haas testified (R., Vol. II, p. 604) that when he bought the Monongahela stock he believed it was worth three times what he paid for it. Since the Commission has found that Mr. Haas paid for the stock a little over $60,000 net, this would mean that the property was worth, in his opinion, approximately $180,000. The property owned by the Monongahela Water Company at the time Mr. Haas purchased 97 per cent. of the stock had been appraised by an independent engineer, Mr. George W. Fuller, at $180,000 (R., Vol. II, p. 676). As we have already pointed out (R., Vol. I, p. 61, 64-65, and p. 61—original p. 125, lines 154, 16, and Exhibit "R," (R., Vol. II, pp. 1110-1111), the engineers for both sides agreed that the reproduction cost of the Monongahela parallel lines was $18,365, and the non-parallel

lines $63,992, making a total reproduction cost, less depreciation, for both parallel and non-parallel lines, of $82,357. At the time of the purchase of the stock by Mr. Haas, the Monongahela Company had a gross revenue of about $27,500 per annum (R., Vol. II, p. 672) and a net revenue of about $9,000 per annum (R., Vol. II, p. 677).

(c) *The Ohio Valley Water Company was justified in purchasing the Monongahela stock at the price paid for it.*

Mr. John M. Hastings, the former president of the Monongahela Company, testified, in substance (R., Vol. II, pp. 834 and 833) that he thought the stock of the Monongahela Company at the price paid by the Ohio Valley Water Company to Mr. Haas therefor was a profitable purchase for the latter company; that it was fully considered by its Board of Directors, and that the Ohio Valley Water Company could supply its water through the Monongahela pipes at the cost of only what extra coal would be required in pumping the water.

(d) *The cost to the Ohio Valley Water Company of the purchase of the Monongahela Water Company lines.*

As we have already indicated the real purchase of the Monongahela lines was made when the Ohio

Valley Water Company bought 97 per cent. of the capital stock of the former and was thus placed in a position to liquidate the Monongahela Company and turn over the pipe lines to itself. As the Commission finds (R., Vol. I, p. 55), the Ohio Valley Water Company paid for 97 per cent. of the capital stock of the Monongahela Company purchased from Mr. Haas, $100,000 in notes of the Ohio Valley Water Company and $192,450 in par value of the capital stock of the latter. As the stock of the Ohio Valley Water Company is $50, in par value, the number of shares turned over in payment was 3,849. In order to determine the price paid for the Monongahela stock it is necessary to ascertain the value at which the said 3,849 shares of Ohio Valley Water Company stock were turned over in part payment. In view of Mr. Haas' testimony (R., Vol. II, p. 604) that he thought the Monongahela stock was worth three times what he paid for it and in view of the Commission's finding that he had paid for it a little over $60,000, he evidently made the sale to the Ohio Valley Water Company on the basis of approximately $180,000 and as he received payment of $100,000 of the price in notes of the Ohio Valley Water Company this would mean that the 3,849 shares of stock of the Monongahela Company were sold to the Ohio Valley Company for approximately $80,000 or about $20.50 per share. Therefore, the cost of this Monongahela stock is shown by the following statement in which there is credited against the stock every dollar realized out of the assets of the Monongahela Company by the Ohio Valley Water Company, the amount thus re-

alized being found by the Commission (R., Vol. I, p. 56):

COST OF MONONGAHELA STOCK.

Notes of Ohio Valley Water Company	$100,000.00	
3,849 shares of Ohio Valley Water Company stock at a little less than $20½ per share	80,000.00	
		$180,000.00

AMOUNT REALIZED FROM ASSETS OF MONONGAHELA WATER COMPANY.

By sale of pumping plant to Ohio Connecting Railroad Company	$ 60,000.00	
By cash on hand and accounts receivable	12,742.86	
By sale of pipe lines to City of Pittsburgh	4,325.94	
		77,068.80
Net cost		$102,931.20

The additional dividend which the Commission in its supplemental report (R., Vol. I, p. 56) says would be paid from the proceeds of the sale of the property is part of the above mentioned $60,000, as the total amount had not been paid by the Railroad Company when the audit of the books was made. We think there is no doubt that Mr. Haas, in payment for the Monon-

gahela stock, accepted the Ohio Valley Water Company stock at not less than $20.50 per share. If, however, any one should question this figure we can at least fix the value of the Ohio Valley Water Company stock at $11.50 per share by direct evidence in the case. One of the witnesses for the defendants in error, Mr. Baldinger, testified (R., Vol. I, pp. 410-411) that as long ago as 1906 the stock of the Ohio Valley Water Company sold at forced sale at $11.50 per share. Even at this low figure the value of the 3,849 shares of stock issued to Mr. Haas in part payment for the Monongahela stock is $44,263.50, and using this figure in the above calculation, after crediting against the cost of the stock everything realized out of the assets of the Monongahela Company, the net cost of the Monongahela stock was $67,194.70. *Yet the Commission finds that the actual cost of the Monongahela system was only* $17,257.14. (R., Vol. I, pp. 56-57.) We earnestly maintain that the Commission's report in fixing the cost of the Monongahela system at this ridiculous figure of $17,257.14 is inaccurate and misleading in the highest degree. The transfer of the pipe lines to the Ohio Valley Water Company was merely the last step in the liquidation of the Monongahela Company and before the Ohio Company could effect a liquidation of the Monongahela Company it was obliged to make a large outlay to which we have referred in purchasing 97 per cent. of the Monongahela stock. Before the Ohio Valley Water Company transferred the Monongahela pipe lines to itself, the Monongahela Company, under the control of the Ohio Valley Company had sold its pumping plant to the Ohio Connecting Railroad Company. The sale of the pipe lines, therefore, to the Ohio

Valley Company was a sale of this remnant of property in liquidation with only one possible purchaser in the field, namely, the Ohio Valley Water Company. The said pipe lines were not worth over $30,000 in the market because the Mononaghela Company then had no pumping plant and no water supply. But when these pipe lines were acquired by the Ohio Valley Water Company they became of much greater value than $30,000, because they were coupled to the excellent water supply of the latter company. This sale of the pipe lines to the Ohio Company at $30,000 therefor was merely the final step in the liquidation of the Monongahela Company and amounted practically to the transfer of the $30,000 from one pocket of the Ohio Valley Water Company to another, as it owned over 97 per cent. of the stock of the Monongahela Company. Speaking of the transfer of the Monongahela Water Company property to the Ohio Valley Water Company, the Superior Court of Pennsylvania said (R., Vol. I, p. 101) that this transfer "for all practical purposes was when the appellant (Ohio Valley Water Company) bought ninety-seven per cent. of the stock" of the Monongahela Company. It is argued that this transfer of the pipe lines to the Ohio Valley Company was a hardship upon the persons holding the 3 per cent. of the Monongahela stock not owned by the Ohio Valley Company. It should be noted, however, that these minority stockholders did very well as compared with the other stockholders of the Monongahela Company. The persons who sold the 97 per cent. of the stock of the Monongahela Company to Mr. Haas participated, pro rata, in a fund of about $60,000 as has been pointed out. The holders of the remaining 3 per cent. of the Mononga-

hela stock, who did not sell their shares, participated, pro rata, in each and all of the following sums of money: $60,000 received from the Ohio Connecting Railroad Company; $4,325.94 received from the City of Pittsburgh, and $30,000 received from the Ohio Valley Water Company, a total of $94,325.94. The said holders of said 3 per cent. of Monongahela stock, therefore, received one and one-half times as much in the liquidation of the Monongahela Company as the holders of the 97 per cent. received from the sale of their shares to Mr. Haas. Furthermore, *the holders of the said 3 per cent. of Monongahela stock are satisfied with their treatment at the hands of the Ohio Valley Water Company, have never made any complaint and are making no complaint now.* What right has the Pennsylvania Public Service Commission to interest itself, uninvited, in a fancied injury to the holders of the 3 per cent. of the Monongahela stock and to punish the Ohio Valley Water Company for this supposed wrong-doing by finding that the cost to the Ohio Valley Water Company of the Monongahela lines was only $17,257.14?

We respectfully request your Honors particularly to note that although the books of account and the evidence in this case clearly show the expenditure by the Ohio Valley Water Company in the purchase of 97 per cent. of the Monongahela stock, yet this is totally disregarded by the Commission which fixes the cost solely on the basis of the sale of the pipe lines in liquidation under the circumstances above mentioned.

The Commission says (R., Vol. I, p. 55) that some time prior to the purchase of the stock of the Monon-

gahela Water Company there had been offered to the Ohio Valley Water Company so much of the plant of the Monongahela Company as was located in McKees Rocks and Stowe Township and Chartiers Township, consisting of water mains, etc., for the sum of $70,000.00 and that this offer was not accepted. The facts as to the previous offers of portions of the Monongahela Company's property are disclosed by the uncontradicted testimony of Mr. Sloane (R., Vol. I, pp. 488, 490-491). If your Honors will examine this testimony you will find that on November 3, 1909, the Monongahela Company offered to sell its *pipe system* in McKees Rocks and Stowe Township for $80,000, and that on August 24, 1911, it offered to sell its *line* and good will in McKees Rocks for $50,000. *Neither of these offers nor any other offer ever made prior to the purchase of the Monongahela stock by the Ohio Valley Water Company included the pumping plant of the Monongahela Company.*

On the general subject of the cost of the property of the Ohio Valley Water Company we respectfully request your Honors to note that the figures of cost given by the accountants employed in this case were only *book cost* and not the actual, historical cost of the property. The accountants knew nothing concerning the facts of their own knowledge, they were forced to rely upon the books and records, and as these were incomplete their figures of cost were necessarily incomplete and referred only to book cost and not the true historical cost. Mr. Knowles testified (R., Vol. II, pp. 847-848) that the actual historical cost of the property of the Water Company is $1,512,000.

The Commission in its supplemental report (R., Vol. I, pp. 71-72) sharply criticizes the Ohio Valley Water Company for issuing securities in connection with the purchase of the properties of the Valley Consolidated Water Company, the Perrysville Water Company and the Benwood Water Company in excess of the values of those properties, respectively. We do not say that there has not been, to some extent, an over-issue of stock of the Ohio Valley Water Company in connection with the said purchases. We do say, however, that the purchase price of those properties should not be limited to the accountants' figures of book cost which are referred to by the Commission. In these accountants' figures not a dollar is included for such large items as interest during construction or going value. Take the cost of the Valley Consolidated Water Company. That Company was in operation and had paid the following dividends to its stockholders:

In 1902	$ 5,238.75
In 1903	10,878.00 and
In 1904	9,000.00

(R. Vol. II, pp. 1073-1074). Can anyone fairly argue that the stockholders of the Valley Company should have sold their property on the basis of partial and incomplete *book cost* and with no allowance for such large items as interest during construction and going value? In connection with the criticisms of the Commission as to these issues of securities, Commissioner Rilling very well said (R., Vol. I, p. 78):

> "If the former officials of the Ohio Valley Water Company have been remiss in their duties

in connection with the financial affairs of the company the Public Service Commission is not the proper forum to correct these matters."

On the general question as to the cost of the property of the Ohio Valley Water Company, we respectfully submit that no estimate fairly reflects the actual cost of the property which includes only $21,614 for interest during construction and only $17,257 as the cost of the Monongahela Water Company system.

Further, on the general question of the cost of the property of the Ohio Valley Water Company it should be noted that not only is the Commission's figure of cost incomplete and inaccurate, but it by no means represents the *value* of the property, to mention but two items:

(a) The *cost* of the real estate and rights of way is placed by the Commisison at $23,444 (R., Vol. I, p. 55—original p. 109, line 14), whereas even the Commission finds that the *reproduction value* of all the real estate is $75,600 (R., Vol. I, p. 61—original p. 125, line 12, last column), and the Commission's findings as to the real value of the real estate are much less than the actual value thereof, as we have endeavored to point out, and

(b) Nothing is allowed for going value.

HEADING X.

THE FEDERAL QUESTION WAS PROPERLY RAISED ON THE RECORD.

This is so clear that we do not believe our opponents will attempt to contradict it. Until the Public Service Commission had made its order the Water Company had no opportunity to raise the Federal question, as there was nothing upon which it could be based. After the order was entered the company promptly appealed to the Superior Court of Pennsylvania in the manner provided in the statute, and the 13th assignment of error filed by the Water Company in said appeal to the Superior Court is as follows (R., Vol. I, p. 82):

> "13. The report, findings, conclusions, ruling, determination and order of the Commission amounts to a deprivation of property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States and of the first and tenth sections of the First Article of the Constitution of Pennsylvania."

Upon said appeal the Public Service Commission filed its answer in the Superior Court in which the following language was used (R., Vol. I, p. 88):

> "The Commission denies that its report and order amounts to a confiscating of the property

of the water company or is a deprivation of property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States and of the First and Tenth Sections of the First Article of the Constitution of Pennsylvania."

Therefore, the question of the violation of the fourteenth amendment was distinctly raised by the Water Company as one of the issues in the case at the earliest opportunity and the Public Service Commission specifically joined in this issue.

Inasmuch as the Water Company won the case in the Superior Court, it had no opportunity to file any assignments of error in the Supreme Court of Pennsylvania raising the Federal question, or any other question. Counsel for the company did, however, file in the Supreme Court the same paper books, or briefs, used on behalf of the Company in the Superior Court (showing the said assignments of error and answer of the Commission filed in the Superior Court) with the addition of a cover bearing the caption of the case in the Supreme Court, so that the question of the violation of the fourteenth amendment was thus presented to the Supreme Court of Pennsylvania. That the said portion of the paper book, or brief, of the Water Company containing said 13th assignment of error and answer of the Commission thereto in that Court was filed in the Supreme Court of Pennsylvania appears from the Certificate of the Prothonotary of the Supreme Court of Pennsylvania and the stipulation of counsel in this case (R., Vol. I, pp. 2 and 3).

Both in the Superior Court and in the Supreme Court of Pennsylvania, counsel for the Water Company vigorously contended that the order of the Commission was a confiscation of the company's property in violation of the fourteenth amendment and that a holding of the Court that the Commission's findings of the character here in question must be sustained, would be likewise in violation of the Constitution.

In the paper books or briefs filed by the Water Company in the Supreme Court of Pennsylvania, the Water Company specifically asserted and argued that to deprive the Company of a judicial review by the Pennsylvania Superior Court of the Commission's findings and order would be unconstitutional as a deprivation of property without due process and supported this argument by references to the decisions of this court. In the said paper books, or briefs, the Water Company further specifically asserted and argued that to uhold a finding of the Commission because sustained by some evidence would, in effect, place in the hands of the Commission "the final determination of the question whether a given valuation or a given rate is reasonable or a deprivation of property without due process" and that any such principle would be a plain violation of the Constiution of the United States. Further, after the Supreme Court of Pennsylvania had announced its extraordinary doctrine in the case at bar, the Water Company, on March 4, 1918, filed in that court a motion and reasons for re-argument, which motion the court, on April 3, 1918, denied with-

out filing an opinion. The first five reasons for a re-argument set forth in the said motion are as follows:

First. It is respectfully submitted that the order of The Public Service Commission of Pennsylvania, wherein the total gross revenue which appellee is permitted to receive is reduced and fixed at the sum of $135,167.66, is a confiscation of appellee's property precisely as if the said property were actually appropriated and taken in condemnation proceedings. Surely, if the gross revenue is fixed at too low a figure, this is confiscation.

Second. It is resectfully submitted that appellee is entitled to a judicial review of this order of the Commission, as otherwise this is a deprivation of property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States and of the first and tenth sections of the First Article of the Constitution of Pennsylvania. Appellee contends that the gross revenue is fixed too low by the Commission. We submit that appellee is entitled to have its contention passed upon by a Court just as it would have that right if this were a condemnation proceeding.

Third. It is respectfully submitted that the opinion of this Court is placed squarely on the ground that the Courts cannot set aside an order of the Public Service Commission if there is substantial evidence to support the order, and this without regard to the fact that the evidence opposed to the order may be far more substantial or the fact that on the whole case the weight of the evidence may be decidedly

against the order of the Commission. It is respectfully submitted that, in a case of this kind, this is an abdication of the proper functions of the Courts, and that the opinion of the Court is a clear denial of the constitutional rights of appellee because, under the opinion, the appellee has been denied the right to a judicial determination by *any Court* of the question whether its property has been confiscated, that is to say, the order of the Commission is upheld merely because there is some evidence to support it and without regard to the question of the weight of the evidence.

Fourth. It is respectfully submitted that the question of fixing the *entire gross revenue* of a public service company is in its essence a *judicial* and not an *administrative* question, and that it is eminently a question for *judicial* investigation. *Grafton County Electric Light & Power Co. vs. State*, 77 N. H., 490 (1915) at p. 508; *Chicago, etc. Ry. vs. Minn.*, 134 U. S., 418 (1890) at p. 458. Therefore, conceding that the Commission has broad powers with respect to *administrative* questions, we earnestly maintain that appellee is entitled to a judicial review of the question here presented, which is clearly a *judicial* question. This means a review by which the Court itself passes upon the weight of the evidence. If the Court's decision is to be determined by the question merely whether there is evidence to support the order of the Commission, this, we respectfully submit, is no judicial review at all.

Suppose any Commission, State or Interstate, were to reduce the entire gross revenue of one of the great

railroad companies to a particular sum stated in the order. If the railroad company appealed to the courts, asserting that such an order was a confiscation of its property, we earnestly maintain that it would be entitled to a judicial review of the question and that it would be the duty of the court itself to pass upon the weight of the evidence. We respectfully submit that the situation is the same in the case at bar.

Fifth. It is respectfully submitted that in a case where the entire gross revenue of a corporation is fixed, the express language of the Pennsylvania Public Service Company Law, which requires the Commission to certify to the Superior Court the record, *including the testimony,* and which provides that the orders of the Commission shall be merely *prima facie* evidence of the reasonableness thereof, and that the Court may reverse the Commission if it finds that the order appealed from is unreasonable or based upon incompetent evidence materially affecting it or otherwise not in conformity with law—this language, we submit, indicates clearly the intention of the Legislature that, in a case such as this, it is the duty of the Court to determine whether the weight of the evidence supports the Commission's order, and it is a violation of constitutional rights to turn the appellee out of a court merely on the ground that there is some substantial evidence which supports the order of the Commission."

The Water Company has, therefore, done everything within its power to raise the Federal question and that it was properly raised is, we submit, absolutely clear.

In *Chicago, Burlington & Quincy R. R. Co. vs. Chicago,* 166 U. S., 226 (1897), the Federal question was raised for the first time on a motion for a new trial and it was also raised in the assignments of error filed in the Supreme Court of Illinois. In an opinion by Mr. Justice Harlan it was held (pp. 231-232) that the Federal question was sufficiently raised, notwithstanding the fact that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. The Court, speaking by Mr. Justice Harlan, said (p. 232):

> "The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right."

See also:

Schlemmer vs. Buffalo, Rochester & Pittsburgh Railway Co., 205 U. S., 1 (1907) (at p. 11).

In *San Jose Land and Water Co. vs. San Jose Ranch Co.,* 189 U. S., 177 (1903), the Federal question was not raised in the complaint, but this court held that it was sufficiently raised because it appeared in a motion for a new trial and in the assignment of error in the State Supreme Court.

As we have already pointed out in the case at bar, the Federal question was squarely raised in the appeal

to the Superior Court in the proper manner and at the earliest opportunity and was likewise raised in the Supreme Court of Pennsylvania.

Respectfully submitted,

GEORGE B. GORDON,

WILLIAM WATSON SMITH,

JOHN G. BUCHANAN,

Attorneys for plaintiff in error.

APPENDIX.

Opinion of the Superior Court in *Beaver Valley Water Company vs. Public Service Commission,* 71 Pa. Superior Ct. Rep., 43 (1919):

"KEPHART, J., January 3, 1919:

The Beaver Valley Water Company was incorporated in 1902 to supply water in a district between Freedom and Baden on the northeasterly side of the Ohio River. Shortly after its organization it took over various water companies supplying seven municipalities covering a stretch of territory approximately eleven miles in length. The company filed two schedules increasing the water rates through this territory, one in 1912 and the second in 1914. Complaints were filed to both of these schedules which were disposed of in this proceeding. The company at that hearing asked that a schedule be adopted which would yield a fair return on a valuation of $2,540,000. This value was arrived at from an appraisement by the company of its property for rate purposes. It had a bonded indebtedness which sold at par for $1,038,000, an indebtedness of the underlying companies of $187,871.34 and a stock issue of approximately $1,000,000. The commission, after hearing the evidence, fixed a value of $985,000. The value so found by the commission represented the "bare bones" of the plant, stripped of all those items

which are sometimes referred to as intangible property, which, with the physical property, make up present value. The commission fixed this at what it would cost at this time to reproduce the physical property of this plant—pipe lines, right-of-way, reservoirs, real estate, etc.—less depreciation. It did not allow for going concern value, or the cost of developing the business of the plant; nor for unpaid or deferred dividends, as suggested in a Supreme Court opinion; nor the property that was not presently useful; nor, it is claimed, property that was in use but was acquired by the company in the nature of a gift; nor did it allow for duplicate lines where the company stated these duplicate lines were necessary to supply present demand. The commission fixed the value as though the plant had been constructed at the present time, less depreciation, with a capacity of each part sufficient to take care of present day demand without regard to whether the plant had one customer or ten thousand customers. The appellant complains that the commission erred in not allowing nineteen separate items of value relating to either the physical or intangible property of the company. They are as follows:

A.	8,470 feet of 12-inch pipe from Freedom to Conway, and rock excavation,	$ 15,772.00
B.	Duplicate pipe in Beaver Falls Distributing System,	39,330.00
C.	Valves, etc., in Beaver Falls Distributing System used with said duplicate pipe,	1,006.40
D.	The People's Warehouse,	5,000.00
E.	The New Brighton Reservoir,	3,000.00
F.	The Upper Freedom Reservoir,	4,000.00

G.	The Freedom Pumping Station,	13,500.00
H.	Paving where mains were laid before pavements,	34,157.45
I.	Service lines installed by consumers,	60,861.50
J.	Lands excluded from valuation,	64,187.50
K.	Water Power Value at Hartman dam,	84,800.00
L.	Water Power Value at New Brighton dam,	88,200.00
M.	Bed of Beaver River,	100,000.00
N.	Proposed additions to plant,	72,607.00
O.	Going concern value,	250,000.00
P.	Cost preliminary to construction.	30,000.00
Q.	Promotion service,	120,000.00
R.	Franchise costs,	
S.	Financing and brokers' fees,	

In *Ben Avon Boro. vs. Ohio Valley Water Co.*, 68 Pa. Superior Ct., 561; 260 Pa., 289, we considered the legal propositions as they bore upon the several questions presented by this appeal. In that case the court, following the direction of the Public Service Act, considered Section 22 of Article VI, of the Public Service Act that required this court upon the record to determine whether the order appealed from was reasonable and in conformity with law. By Section 23 of the same Act, the notes of testimony were made part of the record of the case. If, from this record the order did not appeal to the court as being a reasonable order, either from failure to consider items of value properly proven, or from a manifest disregard of evidence, or from reliance upon incompetent evidence, we were required to proceed as the law directed. The Act plainly directed the evidence be reviewed, although in no event were we

required to act as second administrative commission. In the Ohio Valley case we endeavored to point out where the commission had failed to allow items of value clearly proven and where there was little, and in some instances no testimony, to sustain its action, and where it had erred in its legal conclusion. In so directing, this court refrained as far as it was able from discussing or passing on questions where the evidence was fairly in dispute and the facts were found. The commission neglected to give the values claimed, not because they were not there, but because it, as a commission, did not believe them proper items of rate-making value or claimed that some were insufficiently proven. On review by the Supreme Court, the concluding paragraph of the opinion marks the line for this court's consideration. "Much must be left to the sound discretion of the appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties. Its report must, of course, justify itself in reason, upon review in the appellate courts." Our conclusions in that case were declared to be a substitution by this court of our judgment for that of the commission's. In effect, matters such as here considered by the commission were directed by the Supreme Court to be treated as discretionary matters within the control of the commission. This court was in error in holding that the legislature did not intend the commission's authority to be wholly discretionary, but as it was dealing with substantial property rights its duty was fixed and if the commission failed in its duty, the way was open to the courts to enforce it.

We will not discuss at length the testimony taken in the present appeal. For the purpose, however, of illustrating the effect of the final judgment of the Supreme Court: when we made the order in the Ohio Valley case returning to the commission the record with direction to consider items of value that had been omitted, among those items was one of going concern value, the largest item in dispute. This same value is presented in this appeal. We pointed out that while the commission said it would consider going concern value, *as a matter of fact it did not allow anything for that value.* We pointed to the schedule of reproduction cost, new, less depreciation, made by the commission, as printed on page 565, 68 Pa. Superior Ct. There are enumerated the several items of this cost, and these items in round figures amounted to $995,000. The commission did not contemplate, nor was it ever contended in that case, that the item of going concern value or cost was divisible, to be attached to each of the separate items of physical property enumerated in that schedule. These items represented what it would actually cost—material, ground, labor, etc.—to reproduce the "bare bones" of the plant. The original cost of the property, part of which it was admitted could not be ascertained, as found by the commission, was $841,000 in round figures, not including sufficient amounts for interest during construction, engineering, general administration and other items; but, as is shown the normal increase in the value from the time of purchase to the present time of this physical property would make the difference between rate-making value and the partial original cost as found by the commission, the records as to part of which were lost. This rate value

as fixed by the commission, was in round figures $924,000. *There was no place in the commission's findings for going concern value. It was not allowed.* The record returned would have required a value for this item, determined by the testimony then before the commission, or from such other testimony it desired to secure. It was stated no claim was made that the stockholders suffered by reason of dividends being unduly deferred while the business was being built up. We do not see how deferred dividends could form any basis to fix going concern cost. The earnings of the company may go towards improvements, such as extensions, in which case the stockholders benefit in increased plant account. Whether the stockholders put any or all the money into the concern from their own purses, or use borrowed money, is not the chief concern before the commission, although it may aid on the question of good faith to the public. The commission does not act on the theory that issues of stock are controlling or are evidence to establish value. In the Ohio Valley case, as the bonds and indebtedness were $200,000 more than the value for rate-making purposes, the stockholders, under the commission's orders, were held to be entitled to nothing. The earnings were barely sufficient to pay the interest on outstanding obligations, without considering a sinking fund to retire bonds as they fell due. What we thought the commission should strive to secure is the present value for rate purposes.

In the present case, any reason which we might give for sustaining the item of going value would not be any more convincing than was given in the Ohio Valley case, and the Supreme Court held our action in that case was a substitution of our judgment for that

of the commission's. It may be readily seen how that case controls the present one. There might be this possible difference in the present case. The commission said: 'Upon the basis of the reproduction cost new method of ascertaining value for rate-making, the commission finds that the respondent has failed to sustain its claim for going value.' There was considerable evidence to establish this value, but the action of the commission in the Ohio Valley case did not differ from its unequivocal action in the present case. *It did not allow the value in either case.*

Complaint is made that the commission allowed the value of but one of the duplicating lines in Beaver Falls. Neither system alone was sufficient to supply the present demand according to the appellant's testimony. The value of the distributing system not allowed was $39,300. The reason given was that 'they clearly would not find any physical counterpart in the conception of this plant reproduced.' The commission's reason may be sound as an abstract question, but it must be remembered that these companies were built into boroughs that were at the time thinly settled. A three-inch line was possibly all that would be necessary to supply the inhabitants. As the borough grew the demand grew, but the introduction of a competing system took away the necessity for enlarging the lines of the first company to handle this increased demand. It is quite true that any company building a line through this borough today would put in a main large enough to supply all of the demand, but it is equally true that had a main large enough to supply present-day demand been installed when the plant was first constructed,

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with a Public Service Commission then acting, a physical value then placed upon this property for rate purposes, under the rulings of this commission, would not allow value for a pipe of that size. It would have been over-development. Whether the lines were competing or not, they now are necessary to the company's use. The appellee says they are not.

We appreciate the difficulties under which the commission labors, but we appreciate, too, the difficulties under which investors in public utility companies labor where confiscation of property is permitted by those who are charged with the duty of protecting the owners. Where there is a conflict of testimony and the commission has found the facts, this court has always held that the action of the commission was final unless it was plainly against the manifest weight of the evidence. But, there is a decided difference between weighing disputed evidence and ascertaining whether the commission has refused to consider competent evidence properly before them. All the other items bear a close relation to the questions raised in the Ohio Valley case with the exception of item "A," the pipe line from Freedom to Conway. We think the commission properly disposed of this question. The appellant had a main which ran to the borough and some railroad yards in the line of its activities. They disposed of their distribution system in the borough and they never owned the distribution system in the railroad company's yards. The only thing that was left of their entire plant as it referred to this section was this main which was occasionally called into use by the borough and the railroad company. When the appellant sold

its distribution system, it should have taken care of a portion of the price of this main as it was properly a value that attached to that distribution system. If they neglected this, it was error in business judgment for which the other consumers should not suffer. The commission properly allowed but a portion of the value which was all that the company could expect under the circumstances. The other item of value was "K," the water power dam, sometimes known as the Eastville dam. The west abutment was constructed by the Pittsburgh & Lake Erie Railroad Co. It was built of heavy masonry, constructed with openings for developing the water power available at the west end of the dam. Such was the testimony of the appellant, and without which it would require an extension of one hundred and twenty feet to reach the western bank of the river. There does not seem to be any question about the ownership of this part of the dam. The value was not allowed by the commission for the reason it was stated that the company had paid nothing for this improvement and should, therefore, not be allowed its value. The record does not seem to be as clear on this proposition as appellant seems to contend for, but if it is as they have argued it, we do not understand why the commission should refuse to give value to the company for the piece of property that they were presented with. Under the rules laid down by the Supreme Court in the Ohio Valley case, any opinion different from the commission would be but a substitution of our judgment. It is a claim that rises no higher than brokerage, interest paid during construction, going concern value, real estate owned by the company, and other items that

have heretofore been discussed. We can add nothing to what the Supreme Court has said and what this court has said in a similar case. As the decision of the Supreme Court is binding on this court, we must affirm the order of the commission at the cost of the appellant."

(The italics are ours.)

Office Supreme Court, U. S.
FILED
OCT 13 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

NO. 128 OCTOBER TERM, 1919.

OHIO VALLEY WATER COMPANY, Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, Defendants in Error.

REPLY BRIEF OF OHIO VALLEY WATER COMPANY, PLAINTIFF IN ERROR.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

Smith Bros. Co. Inc., Legal Printers, 409 Grant Street, Pittsburgh, Pa.

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REPLY BRIEF OF OHIO VALLEY WATER COMPANY, PLAINTIFF IN ERROR.

Argument.

It is clear and it is conceded that, at the hands of some tribunal, the Water Company is entitled to a judicial review of the question whether its property is confiscated by the rates imposed upon it under the order of the Pennsylvania Public Service Commission. Now,

on any theory, if the Water Company had the benefit of a judicial review in this case, it must have been before one of the three following tribunals:

(1.) The Commission.

(2.) The Superior Court of Pennsylvania.

(3.) The Supreme Court of Pennsylvania.

Counsel for the boroughs plump for No. 3 and say the judicial review occurred in the Supreme Court of Pennsylvania. The counsel for the Public Service Commission is driven to the conclusion that the judicial review was before the Commission (No. 1). We submit that the Company nowhere received the benefit of a judicial review of the question of confiscation.

(1) It did not and could not receive it before the Commission because, under all the authorities, the Commission in prescribing *future* rates for the Water Company was acting legislatively. How could the Commission in one and the same proceeding fix a schedule of future rates and then judicially review the question of whether they were confiscatory? As stated by this Court in the trenchant language of Mr. Justice Holmes in *Prentis vs. Atlantic Coast Line*, 211 U. S., 210 (at p. 228):

> "Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past."

(2) The Company could not and did not receive a judicial review before the Superior Court of Pennsyl-

vania because while that Court made such a review of the case, its decision was set aside by the Supreme Court of Pennsylvania on the ground that the Superior Court had no right to substitute its judgment for that of the Commission on the question of values. Inasmuch as the question of confiscation turned on the question of the value of the Company's property, it is as clear as sunlight that the limitation imposed by the Supreme Court of Pennsylvania deprived the Company of a judicial review in the Superior Court.

(3) The Company did not and could not receive a judicial review in the Supreme Court of Pennsylvania because that Court neither itself made any attempt to reach an independent conclusion as to the facts nor held that the findings of fact made by the Superior Court were incorrect. The Supreme Court , as we have said, reversed the Superior Court for substituting its judgment as to values for that of the Commission. The Supreme Court of Pennsylvania squarely ruled that, without regard to the weight of the evidence, if there was substantial evidence to suppport the findings of the Commission, the Courts could not overturn them.

In their argument (p. 18) counsel for the defendants in error (other than the Public Service Commission) admit

> "That the order of the Public Service Commission in this case, fixing all the rates of the plaintiff in error, was purely a legislative act.

> That the plaintiff in error was entitled to a judicial inquiry into the question whether this legislative act amounted to a confiscation of its property."

We assume that the admission of the right to a "judicial inquiry" into the question of confiscation means a judicial review of the Commission's findings. By a judicial review we understand a review in which the court passes upon questions of fact in accordance with the weight of the evidence and is not restricted to the question whether there is substantial evidence to support a Commission's finding. We have attempted to show in our brief (pp. 115-158 thereof) that our understanding of what is meant by a judicial review is established by a strong and uniform current of authority. No attempt is made by counsel for the boroughs to controvert our conception of a judicial review or to cite any case in opposition to the numerous authorities collected in our brief on this point. Counsel for the boroughs deny our contention that the Supreme Court of Pennsylvania held that the Commission's findings must be upheld if suported by substantial evidence notwithstanding that by the weight of the evidence the Superior Court had reached a different conclusion. They squarely take the ground that there was a judicial review of this case in the Supreme Court of Pennsylvania. Referring to that court they say (p. 18):

> "That court reviewed the testimony; that court determined the facts, and it is from the judgment of that court this appeal is taken."

We did not suppose our interpretation of the decision of the Supreme Court of Pennsylvania on this point would be questioned. Therefore, that part of our brief (pp. 52-60 thereof) was not made as clear as it now appears it should be in view of the surprising change of attitude of counsel for the defendants in error on this question.

THE SUPREME COURT OF PENNSYLVANIA DID NOT GIVE THE PLAINTIFF IN ERROR A JUDICIAL REVEW; ON THE CONTRARY, IT DECIDED THAT NO COURT COULD DO SO.

Undoubtedly, we submit, the court did so decide. The fact is that the counsel for the defendants in error, having convinced the Supreme Court that it should so decide, now undertake to say that the Supreme Court did nothing of the kind.

After the decision of the Superior Court the boroughs filed with the Supreme Court of Pennsylvania a petition for the allowance of an appeal. In that petition, among other grounds for the appeal, the following is set forth (R. Vol. I, p. 91):

> "SIXTH. Your petitioners aver the Superior Court had no jurisdiction to reverse the order of the Commission and direct it to reform its valuation in accordance with the opinion of the Superior Court, as set forth in paragraph fourth

above. That the effect of said decree is to take from the Commission all discretionary powers and substitute therefor the opinion of the Superior Court."

The seventh reason for the appeal (R. Vol. I, p. 91) is that the Superior Court erred in relation to the valuation of the real estate of the Water Company. In the seventh reason it is urged, as a ground for reversal of the Superior Court's decree, that "there was conflicting evidence as to the value" of the real estate. The twelfth and thirteenth reasons set forth in the petition for appeal are as follows (R., Vol. I, pp. 92-93):

"TWELFTH. Your petitioners aver that if the decree of the Superior Court is permitted to stand, the Commission will be compelled to re-value the respondent's property on the basis of what the Superior Court considers the value should be and will be deprived of the power given the Commission by the Public Service Commission law, 'to reconsider the matter and make such order as shall be reasonable and in conformity with law.'

THIRTEENTH. Your petitioners aver that the decree of the Superior Court directing the Commission to reform its valuation in accordance with the monetary values found by the Superior Court in its opinion, is an assumption of legislative power by the Superior Court, contrary to the provisions of the Public Service Company law and in violation of Section 1 of Article II of the Constitution of Pennsylvania."

Furthermore, counsel for the boroughs filed in the Supreme Court of Pennsylvania, in accordance with the rule of that court, a statement of the questions involved in the case. This will be found in the record (Vol. I, p. 106) and is as follows:

"STATEMENT OF QUESTIONS INVOLVED.

1. Jurisdiction of Superior Court on Appeal from an Order of the Public Service Commission and restrictions thereof.

2. Power of Superior Court to interfere with findings of fact, based upon conflicting evidence.

3. Power of Superior Court to point out and require Commission to consider or ignore certain elements in fixing values.

4. Power of Superior Court to disturb findings of Commission, not assigned as error.

5. Revisory jurisdiction of Supreme Court on appeal from the Superior Court in a case involving an order of the Public Service Commission."

The effect of the said petition for appeal on the minds of the Justices of the Supreme Court of Pennsylvania is shown by the fact that the court not only allowed the appeal, but added the following order (R.

Vol. 1, p. 94), certain portions of which we have italicized:

"ADDITIONAL ORDER.

And now, December 5th, 1917, to the order allowing an appeal in this case is added the following:

On this appeal we desire *specially to hear argument* upon the following points:

(1) The jurisdiction of the Superior Court in the premises and the restrictions thereof; *more particularly, whether on appeal that tribunal has power to interfere with findings of fact of the Public Service Commission and direct that body to reform valuations determined by it, as was done in this case.*

(2) The jurisdiction of the Public Service Commission upon the re-hearing of this case and *how far the Superior Court may modify, confine and restrict the same.*

(3) The revisory jurisdiction of the Supreme Court on this appeal, and to what extent it should exercised.

(4) In connection with points already indicated, we desire argument upon the following question: *How far and to what extent has the Superior Court the right to point out and require the*

Public Service Commission, in fixing values, to consider or ignore certain designated elements, as was done in this case; and more particularly, can it require the Commission further to consider and heed what is known as 'going concern value?'

PER CURIAM."

Having noted the points on which the Supreme Court of Pennsylvania "*specially*" desired to hear argument let us proceed now to the opinion of that court, which is found in the record (Vol. 1, pp. 111-121), certain portions of which we will italicize. At the very outset the Supreme Court said (pp. 111-112):

"Alleging that the effect of the decree of the Superior Court was merely *to substitute its opinion as to the value of certain items of property for that of the Commission,* and that it left to the Commission no duty other than that of making the computations as directed, the Commission and the parties complainant before it, have taken this appeal."

The Supreme Court then quotes certain sections of the Public Service Company law and quotes from the following cases, viz.:

Mt. Union Borough vs. Mt. Union Water Co., 63 Pa. Superior Court, 337;

B. & O. R. R. Co. vs. Public Service Commission, 66 Pa. Superior Court, 403;

Interstate Commerce Commission vs. Illinois Central Railroad, 215 U. S., 452;

Interstate Commerce Commission vs. Union Pacific R. R., 222 U. S., 541;
State vs. Great Northern R. R. Co., 130 Minn., 57;
People vs. McCall, 219 N. Y., 84; affirmed 235 U. S. 345.

The language quoted from every one of these cases goes to the point that the finding of a commission will not be reversed where it is based on substantial evidence and that the court cannot pass upon the weight of the evidence. This was the precise point relied upon by counsel for all the defendants in error and urged by them in oral argument and by printed brief upon the Supreme Court of Pennsylvania. That there may be no doubt upon this point, we have printed as an appendices hereto the entire "Supplementary Argument" printed and presented to the Supreme Court of Pennsylvania by Messrs. David L. Starr, Albert G. Liddell, James McLaren and Leonard K. Guiler, attorneys for the boroughs, and the entire "Supplemental Argument" printed and presented to that court by Mr. Berne H. Evans, counsel for the Public Service Commission, both of these supplemental arguments being prepared with direct reference to, and being devoted almost *in toto* to, the points as to which the Pennsylvania Supreme Court had indicated that it "*specially*" desired to hear argument. (See Appendix "A," p. 1 a, and Appendix "B," p. 1 b.) Every one of the six cases relied upon by the Supreme Court of Pennsylvania and above referred to was cited to it by counsel for the defendants in error. *With the exception of two cases on going value (R. Vol. 1, p. 119), not a single authority*

is cited in the opinion of the Supreme Court of Pennsylvania except the six cases mentioned above. Why did the Supreme Court of Pennsylvania cite these six cases and quote from the opinions therein if it did not mean that they were applicable to the case at bar? Of course, it meant that and nothing else.

But we are not left to inference alone. Referring to the *Mt. Union* case the Supreme Court said (R. Vol. 1, p. 112) that in that case

> "The Superior Court defined its functions in dealing with appeals from the orders of the Public Service Commission."

The court makes substantially the same comment upon *B. & O. R. R. vs. Public Service Commission,* 66 Pa. Superior Ct., 403 (see R. Vol. 1, p. 113). The court in its opinion then proceeds (R. Vol. 1, p. 113):

> "This concise interpretation of our statute, *defining the function of the Court in dealing with appeals from the orders of the Public Service Commission,* is in accord with the general principle announced in the decisions of the Supreme Court of the United States dealing with appeals from the orders of the Interstate Commerce Commission, and it is also in harmony with the decisions of the Supreme Courts of various States, dealing with appeals from the orders of Public Service Commissions."

The court then proceeds to cite and quote from *Interstate Commerce Commission vs. Illinois Central*

R. R., 215 U. S., 452, and *Interstate Commerce Commission vs. Union Pacific R. R.*, 222 U. S., 541 (R. Vol. 1, pp. 113-114). The Supreme Court then says (R. Vol. 1, p. 114):

> "The Supreme Court of Minnesota, *dealing with the same question*, in *State vs. Great Northern R. R.*, 130 Minn., 57, tersely said,"

and proceeds to quote from that case. The Supreme Court then says (R. Vol. 1, p. 114):

> "One of the latest decisions in which was considered *the question of the proper exercise of jurisdiction by an appellate court, in a case similar to the present*, is that of *People Ex Rel. N. Y. & Queens Gas Co. vs. McCall et al., Public Service Commission*, 219 N. Y., 84."

Having thus discussed the authorities the Supreme Court of Pennsylvania winds up as follows (R. Vol 1, p. 115):

> "It is therefore to be regarded as a settled principle that, under such legislation as that with which we are here dealing, in an appeal from an order of the Public Service Commission, the inquiry by the court is not, whether the order is such as the court would have made in the exercise of administrative functions, but whether the order was a reasonable exercise of the discretion conferred upon the Commission by the statute. *In other words, the court is not to substitute its judgment as to rates or values, for that of the Commission.*"

The last sentence epitomizes the opinion of the Supreme Court of Pennsylvania. After a lengthy review of the authorities its conclusion is emphatically expressed in that sentence: *"In other words, the court is not to substitute its judgment as to rates or values for that of the Commission."*

Having discussed the authorities the Supreme Court proceeds to take up the five different elements of value as to which the Superior Court reversed the Commission. The court clearly indicates the question which it proposes to consider by the following language (R. Vol. I, p. 115):

> "In the present case, the appellants contend that the action of the Superior Court in reversing the order of the Commission was in effect merely for *substitution of its judgment as to values,* for that of the Commission. *Taking up the consideration of that contention,* • • • ."

The court introduces its discussion of the five elements of value directed to be added by the Superior Court by the following statement (R. Vol. I, p. 116):

> "In its decision upon the appeal, the Superior Court differed from the Commission as to the *proper valuation* to be placed upon several items going to make up the fair value of the property of the Water Company for rate making purposes."

The Supreme Court then proceeds to discuss the Neville Island property (R. Vol. I, pp. 116-118). It

refers (p. 116) to the "contention" of the Water Company that its sand bar was of special value as a means of producing filtered water. The Supreme Court then says (pp. 116-117):

> "*There was much evidence of high character,* however, before the Commission, tending to show that the theory upon which this contention was founded was not correct; and that the water in the wells did not come from the ordinary channel of the river, but that its source was an underground stream flowing through a bed of sand and gravel, beneath the bed of the overchannel of the Ohio River, and that this stream could be reached in that vicinity by putting down wells at any point on Neville Island, which would tap the underground flow as effectively as did the wells which the plaintiff company located on the said bar at the head of the island."

The court then discusses the evidence of Messrs. Hice and Leaf, witnesses for the defendants in error, and, after referring to the fact that other practical men had testified that water of the same quality could be obtained at other points, *without discussing any of the evidence on behalf of the Water Company,* concludes as follows (R. Vol. I, p. 117):

> "*If the Commission credited the testimony of this nature* which was presented it would beyond question have been warranted in finding from the evidence, that the sand bar upon which the Water Company located its wells had no special value as a source of water supply over other land in the vicinity."

The Supreme Court of Pennsylvania then (pp. 117-118) proceeds to announce a rule of law with respect to the harbor line which is squarely opposed to the decision of this court in *Denver vs. Denver Union Water Company*, 246 U. S., 178, as pointed out in our brief (p. 250 thereof). As to the harbor line, the Supreme Court held that the Superior Court erred, but it should be noted that this alleged error was *not on a question of fact but on a question of law.* The Neville Island property is dismissed with the following statement by the Supreme Court of Pennsylvania (R. Vol. I, p. 118):

> "The Commission had before it testimony as to the actual cost of the Neville Island property, and as we have pointed out, there was ample evidence which *if credited by it*, tended to show that a supply of similar water could be obtained by putting down wells at almost any point within a considerable area of other property in the vicinity. There was *much more testimony which the Commission took into consideration*, in fixing the fair value of that portion of the property for rate-making purposes, and it does not appear that any element properly entering into the value of the Neville Island property was overlooked by the Commission, or that its finding in this respect *was unreasonable or was based on incompetent evidence*, and we can see no sound reason for interfering with the judgment in this respect."

The Supreme Court next considers the parallel lines of the Monongahela Water Company now owned by the Ohio Valley Water Company. The Supreme Court's

conclusion on this point is shown by the following language (R., Vol. I, p. 118):

> "The determination of what was necessary, and what was over-development under the circumstances, was clearly within the proper function of the Commission, and where, as here, *the finding is sustained by competent evidence, and no abuse of discretion is shown*, the finding should not be disturbed by the Court on review."

Going value is discussed by the Supreme Court (pp. 118-120), but here also there is not the slightest attempt to make any finding of fact. As we have pointed out in our brief (pp. 216-245 thereof), the Supreme Court merely announced the extraordinary conclusion that as a *matter of law* the difference between the so-called *cost* of the property twenty years ago and the *value* thereof is going value. This conclusion of law is so palpably erroneous that it needs no further discussion. It is referred to in our brief (pp. 240-241 thereof).

As to interest during construction the Supreme Court says (p. 120), in substance, that whether the construction period was one and a half years was a matter of judgment to be exercised by the Commission. The Supreme Court overlooked the fact that there was no evidence to support this exercise of judgment and that the engineers for both sides had agreed that the construction period would be two and one-half years instead of one and one-half years. This point is discussed in our brief (pp. 210-215).

The question of brokerage or discount on securities is discussed by the Supreme Court of Pennsylvania (R., Vol. I, p. 120). The Supreme Court, as we maintain, reaches an erroneous conclusion as to a question of law, namely, whether the company is entitled to brokerage. The court makes no attempt to discuss the facts on this point except to make the mistaken assertion that the Water Company made no claim that it ever actually paid any brokerage. We have shown this statement to be incorrect in our brief (p. 273).

As we have said above, the Supreme Court, after quoting from other cases, introduced its discussion of the facts in this case in these words (R., Vol. I, p. 115):

> "In the present case, the appellants contend that the action of the Superior Court in reversing the order of the Commission was in effect merely for *substitution of its judgment as to values*, for that of the Commission. *Taking up the consideration of that contention*, • • •."

Everything that follows from that point to the end of the opinion is but the consideration of that contention. The conclusion at which the Court arrives upon that contention and upon the whole case is expressed as follows at the close of the opinion (R. Vol. 1, p. 121):

> "A careful examination of the voluminous record in this case has led us to the conclusion that *in the items wherein the Superior Court differed from the Commission upon the question of values, there was merely the substitution of its judgment for that of the Commission*, in determining that the

order of the latter was unreasonable. The order of the Superior Court is *therefore* reversed and the order of the Public Service Commission is reinstated."

We submit that nothing could be plainer than that the Supreme Court exercised no independent judgment as to the facts, that it felt that it could not do so, that it sustained the contention of the appellants (defendants in error here) that the Superior Court erred in doing so, and that on this ground and this ground alone it reversed the decree of that court and reinstated the order of the Commission. In all this we say that the Supreme Court erred.

If by the weight of the evidence the Superior Court was convinced that the Commission's findings as to values were incorrect, we submit that it was not only the right, but the duty, of the Superior Court to substitute "its judgment" for the judgment of the Commission. How could the Superior Court possibly reverse the Commission on any question of either fact or law if it did not substitute its judgment for that of the Commission? That is what a reversal means in any case.

We respectfully request the Court, moreover, to note that *the Supreme Court of Pennsylvania itself holds that its decision in the case at bar squarely rules the proposition to which we have referred.* It has since cited the case in support of that very proposition. In *Pittsburgh Railways Co. vs. Pittsburgh*, 260 Pa., 424, (1918), that Court, speaking of the Public Service

Company Act and the jurisdiction of the courts on appeal from the Commission, uses this language (p. 427):

> "Since the act just mentioned has become part of our statute law, in cases such as the one at bar, the *courts* have no *jurisdiction* to consider or adjudge the issues involved until they come to them on appeal, and even then their powers are restricted by the limitations of the act and *the established relevant rules governing the review of facts by appellate tribunals*: New Brighton Boro. vs. New Brighton W. Co. & Beaver Valley W. Co., 247 Pa., 232, 240-2; *Ben Avon Boro. vs. Ohio Valley Water Co.*, 260 Pa., 289; St. Clair Boro. vs. Tamaqua & Pottsville Elec. Ry. Co., 259 Pa., 462." (The italics are ours).

It will be observed that the Supreme Court uses the comprehensive term "courts," which, of course, includes the Superior Court and Supreme Court of Pennsylvania.

What, then, are the "established relevant rules governing the review of facts by appellate tribunals" to which the Supreme Court of Pennsylvania refers and which it says are ~~announced~~ followed in the case at bar, as well as the other cases cited in the above quotation? For these rules we need look no further than *Turtle Creek Boro. vs. Pennsylvania Water Co.*, 243 Pa., 401 (1914) which was cited and quoted from at length by counsel for the Public Service Commission in his brief in the case at bar (see pp. 15-17 of that brief). In that case the Supreme Court of Pennsylvania announces its

conception of these "relevant rules" in the following language (pp. 412-413):

> "It may be, as appellant contends, that the *weight of the testimony* would justify a higher valuation, but the question for decision here is whether there was such *palpable error* in the findings of fact as to warrant a reversal of the decree. *Appellate courts do not reverse findings of fact by a court of first instance unless there be manifest error.* This is the rule of all the cases, and, as we view it, is *conclusive against appellant* on this branch of the case at bar. The testimony was ample to sustain the conclusion reached, and *this is the limit of our inquiry*: Rorabaugh's Est., 229 Pa., 377. It is not ground for reversal on the findings of fact that a different conclusion might have been warranted from the evidence, or that *this Court might have arrived at a different result if called upon to determine the fact as a Court of first instance*: Plankington's Estate, 212 Pa., 235. Our duty in reviewing findings of fact, is to ascertain *whether there was testimony, which, if believed, would sustain the findings*: Oil Well Supply Co. vs. Manufacturing Co., 234 Pa., 378." (The italics ars ours).

Considering the language of the Supreme Court of Pennsylvania in the opinion in the case at bar, we submit it is perfectly clear that the court decided that it would not, and the Superior Court could not, reverse the findings of fact of the Commission if they were supported by substantial evidence. We further submit that the question whether this proposition was laid down by the Supreme Court of Pennsylvania passes

beyond the field of dispute into the realm of certainty by the citation of the case in support of that very proposition in *Pittsburgh Railways Co. vs. Pittsburgh*, 260 Pa., 424, at page 427.

THE PUBLIC SERVICE COMMISSION DID NOT AND COULD NOT GIVE THE PLAINTIFF IN ERROR A JUDICIAL HEARING.

The learned counsel for the Public Service Commission apparently concedes that the review of this case in the Supreme Court of Pennsylvania was only a review of an appellate character, not an independent original inquiry, but makes the novel contention that *"In determining the fair value, gross and net annual return, and rate of return to which the Company was entitled, the Commission was performing a judicial function"* (see his brief, p. 9). This contention runs directly counter to the arguments presented by him and by the counsel for the boroughs to the Supreme Court of Pennsylvania, which were to the effect that the Superior Court, in reviewing and differing from that determination of value by the Commission, was usurping legislative powers (see Appendix "A" and Appendix " " p. 34 b and *passim*). In other words, the learned counsel contends that the Commission, in its determination of value which forms the basis of its *legislative order*, was acting *judicially*, and that the Superior Court, in its review of that determination which forms the basis of its *judicial decree*, was acting *legislatively*. "Can such things be, and overcome us like a summer's cloud, without our special wonder?"

We shall not weary the Court by following the learned counsel for the Commission in his course through the legislation defining the various powers of the Commission. Perhaps we have overlooked some of them, and perhaps he has overlooked some of them, and some too that are judicial in their nature. We do not know and we do not care. We do know that all that we have challenged in the courts as confiscatory is an order of the Public Service Commission fixing the entire annual revenue of our client and the rates which it might charge *for the future.*

We do know that such an order, under all the authorities, which we shall not review here (see our brief, pp. 67-84), is a legislative act.* "And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined *by the nature of the act to which the inquiry and decision lead up;*" *Prentis vs. Atlantic Coast Line Co.*, 211 U. S., 210 (1908), at p. 227.

The argument of the learned counsel is nothing but a repetition of the attempt on the part of the legis-

*In our brief, through inadvertence we omitted to cite one of the leading cases, *Milwaukee Electric Ry. & Light Co. vs. Railroad Commission of Wisconsin*, 238 U. S., 174 (1915), in which the court said by Mr. Justice Day (p. 180): "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the State."

lative body, discredited more than a decade ago (see *Prentis vs. Atlantic Coast Line Co., supra,* at p. 228), to "bolster itself up" by pretending to preside over a "litigation in advance." If it be the delegate of legislative power, and it has rightly claimed so to be throughout this litigation, the Commission, like the legislature, must submit the constitutionality of its orders to the consideration of the courts, without claiming any conclusiveness therefor or any power to shut off investigation merely because there is some substantial evidence to support the orders. But the counsel for the Commission would give to its legislative order in this case the effect of a judgment, the result of a judicial inquiry, with which the courts could interfere only if the errors of the Commission were reversible errors of law and not because the order disregarded the clear weight of the evidence. In short, he would confine the court to the exercise of appellate powers only, powers insufficient to secure a judicial inquiry for the very reason that they necessarily presuppose the existence of one. He would thus destroy all independent judicial consideration, and leave independence and conclusiveness only to the action of the body whose conduct is questioned under the Constitution.

An examination of the cases cited by the learned counsel will disclose the fact that in none of them is the Commission described as acting judicially in fixing rates, and that is what is in issue before this Court. On the other hand, the Pennsylvania Supreme Court said in *Bellevue Borough vs. Ohio Valley Water Co.,* 245 Pennsylvania, 114 (1914), at p. 118, and reiterated in

St. Clair Borough vs. Tamaqua & Pottsville Elec. Ry. Co., 259 Pennsylvania, 462 (1918), at p. 469:

> "The disposition everywhere is to commit questions, relating to the regulation and to the rates of public service corporations, to the supervisory powers of special tribunals, and, concededly, matters of this character are *within the domain of legislative action.*"

In other words, in laying down a rule for the future, the Commission is, as the Superior Court, speaking by Judge Head, has said in the latest case, "not a *judicial* body but an *administrative one:*" *Bethlehem City Water Co. vs. Public Service Commission*, 70 Pennsylvania Superior Court, 499, 501 (1918).

We submit, therefore, that we are right and the learned counsel for the boroughs are right in saying (see their brief, p. 18) "that the order of the Public Service Commission in this case, fixing all the rates of the plaintiff in error, was *purely* a legislative act" and "that the plaintiff in error was entitled to a judicial inquiry into the question whether this legislative act amounted to a confiscation of its property." There is no such thing as a *judicial* investigation of an act *by the actor himself* when the act is merely *contemplated.* Especially is this so *when none but himself knows what the act will be*, so as to be able to question its propriety. The question of constitutionality of the Commission's order in this case could be raised only when the order had been made, and it could be judicially determined only by another body than the one which made the order.

INTEREST DURING CONSTRUCTION.

In discussing this item in our brief (pp. 212-215), we stated that the engineers for both the plaintiff and defendants in error agreed that the construction period would be 2½ years. That the engineers so agreed, is denied by the counsel for the Boroughs in their brief (pp. 27-29). In our brief (p. 212) we called attention to the following note shown upon Exhibit "R" (R. Vol. II, p. 1113):

> "Interest During Construction has been computed as per Engineers' Agreement, Construction Period being taken at 2½ years for lands and 2 years and less for plant."

Counsel for the Boroughs in their brief (p. 27) state that Exhibit "R" was a summary prepared by Chester & Fleming, engineers on behalf of the plaintiff in error. This is true and it is also true that the said note upon the Exhibit is supported by the oath of Mr. Chester and no attempt whatever was made to deny its correctness. The fact that the engineers for both sides had agreed that the construction period would be 2½ years was one of the conceded facts in this case. It was specifically admitted by counsel for the Public Service Commission, on pages 25 and 26 of the brief of the Commission, filed in the Superior Court, that the engineers for both sides had agreed that it would take 2½ years to construct the property of the Water Company. In fact, counsel for the Boroughs, in their brief filed in the case at bar, practically admit on page 23 what they deny on pages 27

and 28. On page 23, referring to the matter of interest during construction, they say:

> "It is manifest the Superior Court did not decide this matter at all; it simply accepted *the agreement of the engineers* and reversed the finding of the Commission upon whom the law had cast the burden of deciding the matter."
>
> (The italics are ours.)

It is conceded on all hands that the engineers agreed that 15 per cent should be allowed on the *real estate* of the Water Company. Why was this percentage agreed upon? Because before the company could begin the construction of its pumping plant, reservoirs, transmission system, etc., it had to acquire the real estate upon which they were to be located. The real estate, therefore, would be the first investment. Interest at 6 per cent. per annum (the legal rate in Pennsylvania) for 2½ years, the construction period, is precisely 15 per cent. How did the Commission treat this item of interest during construction as to the real estate of the company? If your Honors will look at the schedule set forth in the report of the Commission on petition for a rehearing (R. Vol. I, p. 61—Original p. 125), you will find in line 12, last column, the figure $75,600 representing the reproduction cost of the real estate of the company as found by the Commission. The next to the last line on this schedule, beginning with the words "10 per cent," has nothing to do with interest during construction—that line refers to the calculation of Engineering Omissions and Contingencies in line 19. The method by which the Commission handled interest dur-

ing construction is shown by the last line on the schedule which reads as follows:

> "6 per cent. on items 1 to 20, inclusive, and item 22, for 9 months (one-half construction period)."

That is to say, the Commission did not allow 18 months' interest on any of the items, but allowed interest on the items specified for half the construction period, or 9 months, at the rate of 6 per cent per annum, which would make the interest allowance on the said items precisely 4½ per cent. If on items 1 to 20 and item 22, as found by the Commission in the seventh column of the schedule, interest at 4½ per cent. is figured, it will amount to $46,671.88, for which the Commission substitutes the even figure of $46,672 shown in said column as interest during construction, from which the Commission deducts $3,770 of depreciation, leaving the net interest during construction in the last column $42,902. Line 12 of the schedule shows that *real estate* is one of the items upon which the Commission calculated interest during construction. The startling discrepancy between the Commission and the engineers for both parties on this item is this: *The engineers agreed that a total of 15 per cent. interest should be allowed on the real estate, whereas the Commission allowed a total of only 4½ per cent. upon this item.* The same discrepancy exists, although to a less extent, in the interest allowance made by the Commission on the remaining items. In this connection, the court will recollect that the note on Exhibit "R," above referred to, recites also that the construction period is taken at 2 *years and less* for plant. Therefore, the

engineers for the parties allowed different amounts upon the transmission system, etc., and upon the buildings, machinery, etc., depending upon the time that would elapse between the making of the investment and completion of construction. Upon all these items the Commission allowed interest at the rate of six per cent. per annum for nine months (R. Vol I, p. 60—Original p. 125). What we complain of is the arbitrary action of the Commission in fixing 1½ years as the construction period, *without any evidence and contrary to the agreement of the engineers for both sides that the period would be 2 1/2 years.* From the language of the opinion of the Supreme Court of Pennsylvania (R. Vol. I, p. 120), that court seems to have been under the impression that the Commission made an allowance of interest for a period of 1½ years. This would seem to indicate that the court believed that interest at 6 per cent. per annum for 1½ years, or a total of 9 per cent. interest, was allowed by the Commission. The fact is, as we have pointed out, the actual interest allowance was 4½ per cent., being at the rate of 6 per cent. per annum for nine months, one-half of the period which the Commission arbitrarily assumed as the construction period.

So far we have treated this question of the allowance of interest during construction as if the findings of the Commission as to values were correct and its only error consisted in fixing the construction period at 1½ instead of 2½ years. But if we are right in our position that a large amount should be added to the values placed by the Commission upon the Neville Island real estate and the Monongahela Water Company parallel

lines, it is obvious that, for this reason alone, a large additional amount should be added to the item of interest during construction.

The statement of counsel for the Boroughs in their argument (p. 28) that the estimate of the engineers as to interest during construction was made on the basis that *after the completion* of the reservoirs, etc., no business was done for one year and *after the completion* of the buildings, etc., no business was done for six months, is clearly incorrect. The engineers figured interest accruing on the various items *during completion* and not *after completion.*

NEVILLE ISLAND REAL ESTATE.

Counsel for the Boroughs in their brief (p. 40) charge us with "playing both ends against the middle" with respect to the Neville Island real estate. They say, in substance, that on the one hand, we claim a high value for this sand bar and on the other hand, claim a 7 per cent. return because of the hazards to which the company is subjected on account of the location of its plant on the bar. If your Honors will turn to our brief (p. 284), you will find that one of the hazards to which we refer is the breaking of the mains crossing the Ohio River in the year 1915, through which the company sustained a loss of approximately $22,000. It is hardly necessary to point out that inasmuch as the company supplies territory on *both sides of the Ohio River*, its mains must cross the river and, therefore, the company cannot escape the hazard mentioned

whether its water supply is located north of the river or south of the river or on an island in the river. As to the other hazards from floods, etc., due to the fact that the water supply and pumping plant are located on an island, we wish to say that it is essential to locate the pumping plant where the water is and that the value of the ample and pure supply of water which the Company takes from its sandbar, which cannot be duplicated elsewhere within a space of seven miles, is so great as fully to justify the hazards of the location.

We do not intend to discuss the many other statements and arguments of counsel for the defendants in error which we believe to be incorrect. For such matters, we will rely upon our brief already filed. We felt, however, that the points herein treated should not be passed over in silence.

Respectfully submitted,

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

APPENDIX "A."

Supplementary Argument.

I.

JURISDICTION OF SUPERIOR COURT ON APPEAL FROM AN ORDER OF THE PUBLIC SERVICE COMMISSION.

The powers of the Superior Court on appeal from an order of the Public Service Commission are found in the following sections of the Public Service Company Law of 1913, P. L. 1374 (*Purdon's Digest*, 13th Ed., Vol. 6, page 7204):

Sec. 22 of Article VI, P. L. 1127, provides as follows:

"SECTION 22. At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law.

SECTION 23. In all such cases the orders of the commission shall be *prima facie* evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants; and the notes of testimony taken before the commission or any of the members thereof, duly certified under its seal, and filed as aforesaid as a part of the record, shall be considered by the court as the testimony in the case.

SECTION 24. If the court shall, upon the rec-

ord find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, upon the record, find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commmission, or is otherwise not in conformity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law. In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon before the commission, it shall remand the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of all costs."

It will be noted that the powers of the Superior Court on appeal, have been clearly set forth by the Public Service Company Law.

It can do one of three things:

1. Enter a decree dismissing the appeal and affirming the order of the Commission;

2. Enter a final decree reversing the order of the Commission;

3. Remand the record to the Commission with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.

The Superior Court itself, has already ruled that it has no authority to fix rates.

Mt. Union Boro. vs. Mt. Union W. Co., 63 Pa., Superior Ct., 337, affirmed in 256 Pa., 516.

It has no power under the law to substitute such order as, in its opinion the Commission should have made, consequently its duties are purely *judicial* as distinct from *legislative* powers.

Bacon vs. Rutland R. R. Co., 232 U. S., 134, 58 L. Ed., 538.

HAS THE SUPERIOR COURT UPON APPEAL FROM AN ORDER OF THE COMMISSION POWER TO INTERFERE WITH FINDNGS OF FACT MADE BY THE COMMISSION?

An understanding of the function and status of the Commission in rate making is necessary to a proper discussion of this question.

It has been judicially determined by the Supreme Court of the United States that the establishment of a rate is an act *legislative* and not *judicial* in kind.

"A judicial inquiry investigates, declares, and

enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind."

Prentis vs. Atlantic C. L. Co., 211 U. S., 210 (p. 226), 53 L. Ed., 150 (p. 158).

"The function of rate making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself, or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

Knoxville vs. Knoxville W. Co., 212 U. S., 1 (p. 8), 53 L. Ed., 371.

The Constitution of Pennsylvania vests all legislative power in the General Assembly, and the Public Service Company Law can only be held constitutional as a valid delegation of legislative power, on the ground that the legislature has committed to the Public Service Commission authority to *determine facts* upon which the provisions of the law may operate, and having determined the facts in a given case, to make an order which shall be reasonable and in conformity with law.

It is contended that the legislature has delegated to the Commission the sole power to ascertain the facts in a given case, and that *where there was evidence to support them* the findings of the Commission are conclusive.

It is further contended that unless there is some provision of the law which gives the Superior Court authority to disturb findings of fact made by the Commission, such power must be taken not to exist.

A careful reading of the law shows that the Superior Court has no such power but that the legislature has delegated specifically to the Commission the power to determine the fair value of the property of a public service company.

Article V, Sect. 20 a of the Public Service Company law of 1913, pages 1415-1416, provides as follows:

> "Section 20 (a). The commission *shall have power,* upon application or upon its own motion, to *ascertain* and *determine* the fair value of the property of every public service company in this Commonwealth, and to *determine* any matter in connection therewith; and shall exercise the said power whenever the same is required, or whenever *it shall deem* such valuation or determination necessary or proper under any of the povisions of this act.
>
> In ascertaining and determining such fair value the commission *may determine every fact, matter,* or *thing, which* in *its judgment,* does or may have any bearing on such value; and *may* take into consideration, among other things, the original

cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance, or other municipal contract, or fixed or proposed by the commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property, and labor, and the developmental and going concern value of such public service company; and these, and any other elements of value, *shall be given such weight* by the commission as may be just and right in each case." (The italics are ours.)

Comparing the above section of the law with the sections relating to the powers of the Superior Court on appeal, it will at once be seen that the Legislature *granted* broad and well defined powers to the Commission and *restricted* the powers of the Superior Court on appeal.

Nothing could be more patent than that it was the legislative intent to empower the Commission to determine "every fact, matter, or thing which, in its judgment, does or may have any bearing on such value," and to restrict the Superior Court to the sole questions as to whether the order of the Commission based upon such value was "reasonable and in conformity with law."

Under Section 23 of Article VI of the law, the order of the commission in this case came into the Superior Court as *prima facie* reasonable, and the burden of proving the contrary was on the Ohio Valley Water Co., appellant in the Superior Court.

Said order also came before the Superior Court with the presumption that it was in conformity with law, because the Commission must be presumed to have obeyed the law, and the burden was on the appellant to show the contrary.

Did the appellant meet that burden in either instance?

The Commission in the exercise of the powers conferred upon it by the statute, determined what in its judgment was the fair value of the Water Company's plant, and on appeal to the Superior Court the Water Company complained of various findings of fact made by the Commission, which entered into its determination of said fair value, and also assigned for error the order of the Commission as to rates.

The Superior Court reversed the *order* of the Commission and directed it to reform its valuation in accordance with the opinion of the Superior Court.

An examination of the petition of the Water Company for appeal to the Superior Court (Appellee's Paper Book, page 160) shows that neither in the petition nor assignments of error accompanying the same, is there any allegation that the *order* appealed from is

unreasonable or *not in conformity with law* neither is it alleged that the order is "based upon incompetent evidence materially affecting the determination or order of the Commission, or is otherwise not in conformity with law."

These were the very questions which the statute has given the Superior Court authority to determine and it has authority to determine nothing else.

The Superior Court was not concerned with the findings of fact made by the Commission, if there was evidence to support them, even though conflicting.

It had no power to disturb the order of the Commission if it was reasonable and in conformity with law.

The opinion or reasoning of the Commission was not assignable as error. If the order was right it was "of little moment what course of reasoning led up to it."

Fullerton's Estate, 146 Pa., 61;
Johnston's Estate, 222 Pa., 514.

The Superior Court disturbed various findings of fact made by the Commission and this raises the question as to

THE WEIGHT TO BE ACCORDED THE COMMISSION'S FINDINGS OF FACT.

The decisions of the Supreme Court of the United States and of other States will aid in deciding this question.

Sect. 23 of the Pennsylvania statute provides that the orders of the Commission shall be *prima facie evidence* of the *reasonableness thereof*, and it follows that the Commission's findings of fact upon which the order is based are entitled to the same weight.

In the case of the *Interstate Commerce Commission vs. Union Pacific Railroad Company*, 222 U. S., 541, the Supreme Court of the United States in deciding whether the Interstate Commerce Commission exceeded its power in fixing a forty-five cent rate on lumber over a longer route when fixing a fifty-cent rate on lumber over a shorter route (p. 547) said:

> "In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. The findings of the Commission are made by law *prima facie* true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Ill. Central vs. I. C. C.*, 206 U. S., 441. Its conclusion is, of course, subject to review, but when supported by evidence is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was a substantial evidence to sustain the order."

In the case of the *Interstate Commerce Commission vs. Louisville & Nashville Railroad Co.*, 227 U. S., 88, at page 100, the Court said:

> **"The order of the Commission restoring a local rate that had been in force for many years and making a corresponding reduction in the through rate was not arbitrary, but sustained by substantial though conflicting evidence. The Courts cannot settle the conflict nor put their judgments against that of the rate-making bodies."**

The Court had previously said on page 92:

> "In a case like the present, the Courts will not review the Commission's conclusions of facts (*I. C. C. vs. Del., etc., Ry.*, 220 U. S., 235, 251), by passing upon the credibility of witnesses or conflicts in the testimony."

And on page 98, the Court said:

> "The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate making in each section of the country."

In *Interstate Commerce Commission vs. Illinois Central R. R.*, 215 U. S., 452 (470), the Supreme Court held in an opinion by Chief Justice White:

> **"Beyond controversy in determining whether an order of the Commission shall be suspended or set aside, we must consider:**

(a) All relevant questions of constitutional power or right.

(b) All pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and,

(c) A proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the execution of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be in the elementary rule that the substance and not the shadow, determines the validity of the exercise of the power. *Postal Tel. Cable Co. vs. Adams,* 155 U. S., 688-698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed and whose discharge may not be by us in a proper case avoided, it is plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative orders upon our conception as to whether the administrative power has been wisely exercised."

In the *Intermountain Rate cases,* 234 U. S., 490, the Court, in passing upon this very question say:

"It is, of course, true as pointed out in *Interstate Commerce Commission vs. Illinois Central R. R.,* 215 U. S., 452, 470, and since repeatedly ap-

plied, that findings of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review; but that doctrine does not relieve the courts in a proper case from determining whether the constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an arbitrary way as to amount to the exertion of authority not given."

And in *Knoxville vs. Water Co.*, 212 U. S., 1 (p. 17), the Supreme Court held it would not enjoin a rate unless it was found "that it was impossible for a fair minded board to come to the result which was reached."

In the case of *M., St. P. & S. S. M. R. Co. vs. Railroad Commission*, 136 Wis., 146, the Court said:

"With reference to the order appealed from, were this Court sitting as a railroad commission it would not have made the order in question, because while the order is no doubt of great convenience to the dwellers about Dwight, their interests seem to us to be overbalanced by the larger interests of the general public. But this is far from saying that we find the order to be unreasonable or that it appears to us by clear and satisfactory evidence that the order is unreasonable. Competent and reasonable men might differ with regard to the propriety or with regard to the justice or reasonableness of the order before the Court. The function of the Court is not to determine whether a rate or service fixed by it is reasonable

and just, but to determine whether the order is unreasonable or unlawful. If the order be found by the Court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable."

In *State vs. Great Northern Ry. Co.*, 130 Minn., 57, the Appellate Court said:

"There is no test of reasonableness that will fit all cases, but an order is unreasonable if contrary to Federal or State constitution or laws, or if beyond the power of the Commission, or if based on mistake of law, or if without evidence to support it, or if so arbitrary as to be beyond the exercise of reasonable discretion and judgment."

Page 59 *id.*

"The Legislature never intended that the court should put itself in the place of the Commission, try the matter anew as an administrative body, substituting its findings for those of the Commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of non judicial powers."

And on page 60 the court, referring to *Stevenson vs. Great Northern Ry.*, 69 Minn., 353, a rate case, states:

"It was the intention of the Legislature that the court on appeals should approve the findings of the Commission in the same manner as the Appellate Court review the findings of a jury on a trial in the court below, and for this purpose the court

may examine the whole matter in controversy including matters of fact, as well as questions of law, but that the district court can review the findings of the court only so far as to determine whether or not the rates fixed by the Commission are reasonable. The, court, on appeal from the order of the Commission, must distinguish, then, between the legislative power to establish regulations and the judicial power to determine upon the reasonableness of regulations already established."

In *People ex rel. New York and Queens Gas Co. vs. McCall*, 219 N. Y., 84, the appellate court said:

"The public service commissions are authorized by law to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities." (Pub. Serv. Comm. Law [Cons. Laws, ch. 48], p. 66.)

Under the authority of this statute the public service commission for the first district made the order requiring the relator to extend its gas mains and services to meet the reasonable requirements of Douglaston and Douglas Manor.

In applying the provisions of this statute the court at the Appellate Division said: "We have no doubt that under this law the question remains for the court to determine upon the review of the determination of the Public Service Commission whether the extension ordered was a reasonable extension.

This statement of the law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the public service commission, and it can only annul the order of the commission for the violation of some rule of law.

The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the State in the conduct of their business and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed, perhaps, by the legislature that the members of the public service commission would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. It was not intended that the courts should interfere with the commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control.

The law governing the commissions is well expressed bp the Minnesota Supreme Court in *State vs. Great Northern Ry. Co.* (153 N. W. Re. 247). It is there said:

> "The order may be vacated as unreasonable if it is contrary to some provision of the Federal or

State constitution or laws, or if it is beyond the power granted to the commission, or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interests of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment. See also *People ex rel. Town of Hemstead vs. State Board of Tax Comrs.*, 214 N. Y., 594; *People ex rel. Morrissey vs. Waldo*, 212 N. Y., 174)."

In *Pa. R. R. Co. vs. Pub. Ser. Co.*, 67 Pa. Superior Court, 575 (p. 580), the Superior Court in an opinion by Orlady, P. J., thus construed its powers under the Public Service Company law:

"We said in *B. & O. R. R. Co. vs. Public Service Commission*, 66 Pa. Superior Ct., 403, 'The functions of this court upon appeals from orders of the Public Service Commission, have been plainly stated in *Borough of Mount Union vs. Mount Union Water Co.*, 63 Pa. Superior Ct., 337, and in *West Virginia Pulp Co. vs. Public Service Commission* (not yet reported). We have declared in these decisions that the statute exhibited no legislative intent to convert the Superior Court of Pennsylvania into a second administrative tribunal, or to place upon the shoulders of the judges of that court the duty of examining and weighing all the evidence and determining for themselves what would be a reasonable rate for the transportation of any commodity.'"

And again in *Buffalo & L. E. Trac. Co. vs. Public*

Service Co., 67 Pa. Superior Court, 581 (p. 583), in an opinion by Williams, J., the Superior Court said:

> "Upon an appeal from the order of the Public Service Commission we determine whether 'the order appealed from is reasonable and in conformity with the law;' that is to say, whether it is based upon competent evidence: Act of July 26, 1913, P. L. 1374. Sections 22 and 24, Art. VI; *Borough of Mt. Union vs. Mt. Union Water Company*, 256 Pa., 516, affirming 63 Pa. Superior Ct., 337. No objection was raised to the evidence, so the reasonableness of the order is the only question to be considered."

This court, without exception, has held that questions of fact are for the tribunal below, be it auditor, commissioner, jury, or the court sitting under the powers of the Act of April 22, 1874.

Hamilton vs. Hopkins, 247 Pa., 501.
Commonwealth vs. Westinghouse Elect. & Mfg. Co., 151 Pa., 265.
Commonwealth vs. Hulings, 129 Pa., 317.
Brown, Early & Co. vs. Susquehanna Boom Co., 109 Pa., 57.
White, Appellant, vs. Wright, 179 Pa., 76.
Kelly vs. Traction Co., 204 Pa., 625.
Dutton's Estate, 181 Pa., 437.

Tested by the above decisions it will be seen that the order of the Commission in this case and the findings of fact upon which it is based are entitled to every presumption in their favor; that if an order is such that reasonable men might well differ as to its correct-

ness, it cannot be said to be unreasonable; that if no objection is raised to the evidence, the reasonableness of the order is the only question to be considered; that if the order was not arbitrary but sustained by substantial, thuogh conflicting evidence, the courts cannot settle the conflict nor put their judgment against that of the Commission.

If the foregoing be the proper interpretation of the law then the Superior court had no authority to order the Commission to revalue the Neville Island property of the Water Company at $100,000.00 because the evidence was conflicting as to such value, and the record did not show that the Commission did not consider all the elements that tended to make up such value.

So with the order as to the PARALLEL LINES and INTEREST DURING CONSTRUCTION, the LATTER NOT HAVING BEEN ASSIGNED AS ERROR IN THE SUPERIOR COURT.

Sect. 17, Art. VI of the Public Service Company Law, as amended by the Act of June 3rd, 1915, P. L. 782 (Purd. Vol. 6, page 7234), provides in part as follows:

> "All appeals to the Superior Court shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the Commission; * * *."
>
> "Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition."

The Commission found (page ....) that a construction period of eighteen months was sufficient within which to repoduce the Water Company's plant, and the Superior Court with no assignment of error to this finding, as required by the Act, directed that an additional year's interest be allowed.

It is contended that the appellant in a case of this kind should be held to a strict compliance with the Act which authorizes the appeal and provides what shall be done by the appellant.

The familiar language of the Act of March 21, 1806, Sec. 13, 4 Sm. L. 326, is equally pertinent here:

> "In all cases where a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this Commonwealth the directions of the said acts shall be strictly pursued."

Further argument on the subject would seem to be unnecessary in view of the numerous decisions of this court on Rule 26, containing almost the same requirement as to specifying error.

As to Brokerage, the Commission found that there was no sufficient evidence that any sum had been paid for that purpose, and refused to allow any amount.

The Superior Court held in its opinion (page ....) that discount or brokerage should be allowed as a capital charge, that there was sufficient evidence before the Commission to determine the same, and that the

estimate of the engineers that seven and one-half per cent. of the reproduction cost would be a fair amount and would not be unreasonable.

As to whether discount or brokerage when the same has actually been paid, should be allowed as a *capital charge*, is a very doubtful question. The question has been discussed at length by counsel for the Commission in his paper book, pages 26, 27, 28 and 29.

If brokerage was actually paid certainly there is nothing in the argument of counsel for the Water Company, which refers to any evidence as to what the amount thereof was. (Paper Book of Appellee, pages 251, 252, 253, 304, 305). The whole argument rests upon the *estimate* of the engineers. Aside from the question of law as to whether brokerage is a proper capital charge, the Commission was acting within its discretionary powers in refusing to allow it, in the absence of evidence that it had been actually paid.

As to Going Concern Value the Superior Court found (Page ....) that "the lowest amount fixed by the appellant's evidence would not be an excessive value for this item." This question has been fully covered in the Paper Book of the Commission, pages 29 to 40, and in this Paper Book, pages 29 to 43, *post*.

It is contended that the question was one for the Commission, "to be given such weight by the Commission as may be just and right," and that where, as in this case, the report of the Commission shows that it was given due consideration, the Superior Court has

no power to order the Commission to fix an amount which in the opinion of the Court "would not be an excessive value for this item."

II.

JURISDICTION OF PUBLIC SERVICE COMMISSION UPON REHEARING OF THIS CASE AND HOW FAR THE SUPERIOR COURT MAY MODIFY, CONFINE AND RESTRICT THE SAME.

On this question it is contended the Act of June 24, 1895, Sect. 8, P. L. 212 (4 Purd. 4504-37), granting the Superior Court power to affirm, reverse, amend or modify any order, judgment or decree, as it may think just, has no application.

As already shown, the powers of the Superior Court on appeal from an order of the Commission are specifically defined in Sect. 24 of the Public Service Company law. It may affirm, reverse or remand the record to the Commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.

It would be a strained construction if this latter clause were taken to mean that the Superior Court has authority, thereunder, to direct the Commission to make such order as the Court thinks proper. It would be a

futile thing for the Commission to reconsider the matter if it was under the necessity of making an order already determined upon by the Superior Court.

It is therefore urged that the true interpretation of the Public Service Company law is, that where the Superior Court remands a case with directions to reconsider, etc., the Commission is bound by the law of the particular case as determined by the Court, but it still has the same discretionary powers and is sole judge of the weight to be given the testimony and the facts deduced therefrom.

If this be true, cases may arise where the Commission, after giving due consideration to the law as laid down by the Superior Court, on appeal, may make the same order as in the first instance, but this is often what happens when a new trial is granted by the apellate Court, where the verdict was considered excessive, the charge of the court inadequate or misleading, or the case went to the jury on a mistaken view of the law.

Any other interpretation of the law relating to the powers of the Superior Court over the Commission on appeal, would reduce the latter to the plane of a commissioner to take testimony and, shorn of the administrative powers given it by the Act, it would become instead of a Rate-Making Commission, composed of seven men, a second-rate commissioner, with seven men doing the work of one.

III.

THE REVISORY JURISDICTION OF THE SUPREME COURT ON THIS APPEAL AND TO WHAT EXTENT IT SHOULD BE EXERCISED.

The manner in which appeals to the Supreme Court may be taken and prosecuted, is found in Sec. 2 of the Act of July 11, 1917, No. 311, which amends the Public Service Company Law. The last clause of the first paragraph of Sec. 30 of said Act, as amended, provides as follows:

> "Such appeal shall be taken and prosecuted in the same manner, and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court."

The general language of this clause would seem to give the Supreme Court jurisdiction to enter such decree as in its opinion the Commission should have made, in line with its powers on appeal from a judgment of the Superior Court, as provided by the Act of June 24, 1895, Sec. 9, P. L. 212 (*2 Purd.*, 4518-37).

But when it is recalled that the establishment of a rate is "an act *legislative, not judicial,* in kind," *Prentis vs. Atlantic C. L. Co.*, 211 U. S., 210 (p. 226), above, this clause of the Act must be construed in harmony with Art. V, Sec. 21, of the Constitution of Pennsylvania, which provides:

> "No duties shall be imposed by law, upon the Supreme Court, or any of the judges thereof, except such as are judicial; * * *"

In the absence of authority on the subject it is submitted that the jurisdiction of the Supreme Court on this appeal is strictly judicial; that it has power to affirm or reverse the decree of the Superior Court or modify the same within judicial limits; that it has authority to determine whether the Superior Court exceeded its jurisdiction, whether the order of the Commission was in conformity with law, and whether the burden of disproving the *prima facie* reasonableness of said order was met and overcome by the appellant in the Superior Court.

In a word it may enter any "judgment, order or decree as may be just" with the single proviso that *it may not establish the rate*, because that is *legislative* in character and such duty cannot be imposed upon the Supreme Court.

It might be well in this connection to call attention to the policy of the Supreme Court of the United States, not to disturb rate schedules until they have been given a trial in actual practice.

> "The courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. If hereafter it shall appear under the actual operation of this ordinance (an ordinance fixing maximum water rates for the City of Knoxville) that the return allowed by it operates as a confiscation of property, nothing in this judgment will prevent another application to the court, but as the case now stands there is no such certainty that the rates will necessarily have

the effect of denying to the company such a return as would avoid confiscation."

Knoxville vs. Water Co., 212 U. S., 1 (p. 19); 53 L. Ed., 371 (p. 382).

"Where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating as far as possible the doubt arising from opinions as opposed to facts."

Wilcox vs. Con. Gas Co., 212 U. S., 19 (p. 42); 53 L. Ed., 382 (p. 395).

Conclusion.

We submit to the court that under the law and the rulings of the courts as set forth in this argument, the only power of the Superior Court is that power granted to it by the Legislature. It is a court which exists solely, not by constitutional authority, but at the will of the Legislature, and its powers are no more nor less than those given it by the authority under which it exists. It does not stand on the same high plane as the Supreme Court. The Supreme Court of the State of Pennsylvania exists and is endowed with its powers by the sovereign will of the people of the State as expressed in the Constitution, and we believe that in addition to the powers granted your Honorable Court by the Constitution, the Act of June 24, P. L. 1895, page 212, Section 9, wipes out any doubt that might arise

as to the powers of this court to modify, affirm or dismiss any proceeding before or action taken by the Public Service Commission. It is true it may be argued that this question being purely legislative, it is entirely within the power of the Legislature, but the Legislature has clearly shown in the words of the Act allowing appeals from the Public Service Commission that it intended to distinguish between the powers of the Supreme Court and the powers of the Superior Court. The Superior Court is restricted as we have heretofore stated to the three methods of procedure, viz., dismissal, affirmation or referring back the case for further consideration, while in Section 30, P. L. 1917, 810, it is provided "such appeals shall be taken and prosecuted in the same manner and with the same effect, as is provided in other cases of appeal from the Superior to the Supreme Court."

The question then arises under what theory or on what grounds did the Superior Court interfere with the Commission's decision.

Was there evidence as to the items on which the Superior Court changed the values? The testimony of the various witnesses on the part of the complainant (pp. 214, 237, 248, 288, 321, 435, 510, 540, 575, 1015, 1016, a) shows there was, as to the real estate on Neville Land (pp. 487, 488, 728, 735, 738, 743, 1322, 1325, 1367, 972, 919, 946 a), that there was testimony as to the value of the Monongahela acquisition, and whether it was used and useful for the present needs of the company.

The Secretary and Treasurer of this Water Company, p. 99 a, was unable to name any amount or any person or persons to whom brokerage was paid; the Engineers for the Boroughs denied that it was a proper charge, and the Commission refused to allow it for the reason that in their opinion no evidence was produced showing that any had been paid. A question of fact.

Interest during construction; here again the Superior Court crosses over the line of facts into the realm of conjecture (page 1877 a). Rickett & Co., Auditors for the Water Company give this amount as $21,550 and the Commission (appellee's paper book, p. 115), allow $21,614 for the item. Any finding other than that of the Commission is on the grounds that Reproduction Value must govern rather than fair value.

Going value: This subject will be fully discussed by Counsel for the Public Service Commission. We believe the Superior Court fell into error on this item; because it fails to recognize the line where "Going Value" ends and "Good Will" begins.

Respectfully submitted,

DAVID L. STARR,
ALBERT G. LIDDELL,
JAMES MCLAREN,
LEONARD K. GUILER,
Attorneys for Appellants.

APPENDIX "B."

Supplemental Argument.

I. THE JURISDICTION OF THE SUPERIOR COURT IN THE PREMISES AND THE RESTRICTIONS THEREOF.

The jurisdiction of the Superior Court to review the actions of the Commission is to be found in the Act of July 26th ,1913 (The Public Service Company Law), as amended by the Act of July 3rd, 1915. The Amendatory Act provides that appeals from the determinations of the Commission shall be to the Superior Court instead of to the Court of Common Pleas of Dauphin County; and the original Public Service Company Law provides in Section 24 of Article VI that

> Section 24. If the court shall, upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the Commission. If the court shall, upon the record, find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such or-

der as shall be reasonable and in conformity with law. In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon before the commission, it shall remand the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law. In making any final decree or any appeal the court shall have full power to dispose of all costs.

The Public Service Company Law in Section 18 of Article VI, directs the Commission upon the receipt of notice of the appeal to certify to the court the record of the proceedings, which record shall include the testimony taken, the findings of fact, if any, of the Commission based upon such testimony, a copy of all orders made by the Commission in said proceedings and a copy of the opinion, if any, filed by the Commission.

Section 22, Article VI, provides:

"At the hearing of the appeal, the said court shall on the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law."

and Section 23 that

"In all such cases, the orders of the Commission shall be *prima facie* evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants and the notes of testimony taken before the Com-

mission or any of the members thereof, duly certified under its seal and filed as aforesaid as a part of the record, shall be considered by the Court as the testimony in the case."

The Public Service Company Law, Acts of Assembly, 1913, P. L. 1374, page 1427; Acts of 1915, P. L. 779.

The jurisdiction of the Superior Court to pass upon the reasonableness of decisions of the Public Service Commission is entirely statutory, as is the court itself, and its authority to act must be found in the only statute which gives it any jurisdiction at all, that is the Public Service Company Law.

It will be seen that the Superior Court upon appeal from the Commission is authorized to dismiss the appeal, to reverse the order of the Commission or to remand the record to the Commission with directions to re-consider the matter and make such order as shall be reasonable and in conformity with law.

It can remand the record of the Commission only in case it finds upon the record that the order of the Commission is unreasonable or is based upon incompetent evidence materially affecting the determination or order, or is otherwise not in conformity with law. Its action on appeal is to be based entirely upon the record certified by the Commission, and in considering whether the order of the Commission is reasonable or unreasonable, the order itself shall be *prima facie* evidence of the reasonableness thereof.

There was no contention, nor was it suggested in the opinion of the Superior Court that the decision of the Commission was based upon incompetent evidence materially affecting the determination, so that the action of the Superior Court must have been taken on the ground that the order of the Commission was unreasonable or otherwise not in conformity with law. And the reading of the opinion inevitably leads to the conclusion that the court acted upon the theory that it was to substitute its opinion of reasonableness for that of the Commission.

There can no longer be any doubt but that the regulating and fixing of rates for public service companies is a legislative function and that the Legislature is authorized to empower a Commission to fix reasonable rates.

Railroad Commission Cases, 116 U. S. 334.
Interstate Commerce Commission vs. Goodrich Transit Company, 224 U. S. 194.

And it cannot be doubted that the Legislature can make the rates found by the Commission *prima facie* reasonable.

Ill. Cent. R. R. vs. I. C. C., 206 U. S. 441.
R. & D. R. R. vs. Tramwell, 53 Fed. 196.
Com. vs. C. & W. Ry. Co., 114 N. E. 325.

It then becomes the duty of the Court to accept the decision of the Commission unless it is shown to be unreasonable and we contend that this does not authorize the Court to substitute its judgment for that of the Commission. The question in the Superior Court turns on the inquiry as to whether or not there has

been a reasonable exercise of the discretion vested in the Commission not whether the Superior Court agrees with the discretion thus exercised.

The provisions found in The Public Service Company Law are very similar to those contained in the Interstate Commerce Acts and the Acts establishing commissions in other States and the decisions on these acts are directly in point here.

The United States Supreme Court deals with Commission control in two classes of cases; (1) cases which come there on compaint that the action of a State commission is illegal under the Fourteenth Amendment, and (2) cases attacking the statutory power of the Interstate Commerce Commission. The cases under (2) are practically identical with the case here and the Supreme Court has enumerated the instances in which it will set aside the action of the Commission.

In Interstate Commerce Commission vs. Illinois Central Railroad, 215 U S. 425, the Supreme Court said:

> "In determining whether an order of the Commission shall be suspended or set aside, the Supreme Court must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) whether, even although the order be in form within the delegated power, nevertheless, it must be treated as not embraced therein, because its authority has been manifested in such

an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power; but (d) the Supreme Court may not, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful order upon its conception as to whether the administrative power has been wisely exercised."

Later the same Court in *Interstate Commerce Commission vs. Union Pacific Railroad,* 222 U. S. 541, elaborated the instances in which it will set aside an order of the Commission in the following statement:

"While there has been no attempt to make an exhaustive statement of the principles involved, in cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority there involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not

the shadow, determines the validity of the exercise of the power."

See also:

Atchison, Topeka & Santa Fe R. R. vs. United States, 232 U. S., 199;
I. C. C. vs. L. & I. Ry., 227 U. S., 88.

The Courts of the various States have taken a similar position on statutes like the Public Service Company Law and held that the Appellate Court should not decide what would be, in its opinion reasonable, but whether the Commission's decision is such that reasonable men might differ regarding it.

In Maryland in *Public Service Commission vs. Northern Central R. R.*, 122 Md. 388, the Court said:

"The Court's function is not legislative; it has no power to reform or remake or modify the rates made by the Commission. It must sustain the order of the Commission or vacate it. The Court will vacate the order if, among other reasons, the Court finds that there was no evidence before the Commission to support it or that the evidence was inconclusive. But it will not pass on the weight of conflicting testimony nor substitute its own opinion for that of the Commission on questions of fact or as to which party's testimony preponderates."

'Citing:

136 Wis. 164;
I. C. C. vs. L. & N. R. R., 227 U. S.;
I. C. C. vs. U. P. R. R., 222 U. S., 547.

'Judge Thomas, in delivering the opinion of the Court of Appeals in the above case, said on this point (122 Md., at 388):

> "It must be observed that the power of the Commission to fix reasonable rates, etc., is legislative—*Gregg vs. Laird,* 121 Md. 1—and that the functions of the Court in reviewing the actions of the Commission are distinctly judicial, and are exercised only for the purpose of determining whether such action of the Commission is unreasonable or unlawful. Section 46 of the Act declares: * * * Upon an application to the Court for an injunction restraining the execution of an order of the Commission, the Court has no authority to determine what would be a reasonable rate for the service required, or to establish rates, but its power is limited to the determination of the question whether the rates fixed by the Commission are unreasonable or unlawful, and until it is made to appear by clear and satisfactory evidence that the action of the Commission is unreasonable or unlawful, the Court is without power to impose any restriction upon the execution of the Commission's order. Under section 44, the evidence taken before the Court was referred to the Commission, and the Commission having refused to modify its previous order, that order stands as if based upon all the evidence in the case."

The Supreme Court of Wisconsin in *M., St. P. & S. S. M. Ry. vs. Commission,* 136 Wis. 146 definitely set-

tled a contention similar in every way to the one involved here when it said:

> "With reference to the order appealed from, were this Court sitting as a railroad commission it would not have made the order in question, because while the order is no doubt of great convenience to the dwellers about Dwight, their interests seem to us to be over-balanced by the larger interests of the general public. But this is far from saying that we find the order to be unreasonable or that it appears to us by clear and satisfactory evidence that the order is unreasonable. Competent and reasonable men might differ with regard to the propriety or with regard to the justice or reasonableness of the order befor the Court."
>
> "The function of the Court is not to determine whether a rate or service fixed by it is reasonable and just, but to determine whether the order is unreasonable or unlawful. If the order be found by the Court to be such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable."

In *Grand Rapids & I. R. R. Co. vs. Michigan R. R. Commission,* 154 N. W. 16, the Appellate Court said:

> "The question was one of fact and the testimony before the Commission was sufficient to support the conclusion reached. If the conclusion arrived at by the Commission finds justification in the testimony, this Court will not substitute its judgment for that of the Commission."

The Supreme Court of Minnesota in *State vs. Great Northern Railroad,* 153 N. W. 257, clearly states the principle as follows:

> "The principle on which the Court acts in determining whether or not an order of the Commission is reasonable, has been the subject of much controversy, but the law upon the subject is now well settled. *The Legislature never intended that the Court should put itself in the place of the Commission and try the matter anew as an administrative body, substituting its findings for those of the Commission* * * *.
>
> *"The Courts must not usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom."* (*Italics ours*).

See also:

Appeal of City of Norwalk, 94 Atl. 998 (Connecticut).

West Jersey & S. S. Ry. vs. P. S. Commission, 94 Atl. 57 (New Jersey).

Probably the most recent state decision on this question of the jurisdiction of the Appellate Court is in the case of *People ex rel N. Y. ex rel N. Y. & Queens Gas Co. vs. McCall et al, Pubic Service Commissioners,* 113 N. E. 795.

In reviewing an order of the Public Service Commission of New York the Appellate Division had re-

versed the Commission under the following interpretation of the provision for an appeal:

> "We have no doubt that under this law the question remains for the Court to determine upon review of the determination of the Public Service Commission whether the extension ordered was a reasonable extension."

In reviewing the foregoing statement, the Court of Appeals said:

> "This statement of the law is quite likely to create a misapprehension as to the power of the court. The court has no power to substitute its own judgment of what is reasonable in place of the determination of the Public Service Commission, and it can only annul the order of the Commission for the violation of some rule of law.
>
> The Public Service Commissions were created by the Legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in the conduct of their business, and compel those corporations adequately to discharge their duties to the public and not exact therefore excessive charges. It was assumed perhaps, by the Legislature that the members of the Public Service Commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations.

It was not intended that the courts should interfere with the Commissions or review their determinations further than is necessary to keep them within the law and protect the constitutional rights of the corporations over which they were given control * * *.

The court at the Appellate Division did not therefore have the power to determine that the extension of the relator's gas mains and pipes ordered by the Public Service Commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary, or capricious exercise of power.

The relator argues, in support of the power of the Appellate Division to review generally the reasonableness of the order of the Public Service Commission that the necessary authority is given by the provision with regard to the writ of *certiorari* contained in section 2140 of the Code of Civil procedure. That section reads as follows:

'Sec. 2140. The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

'1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.

'2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.

'3. Whether, in making the determination,

any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

'4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

'5. If there was such proof, whether there was, upon all the evidence, such a preponderence of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the Supreme Court, triable by a jury, would be set aside by the court, as against the weight of evidence.'

I do not understand that this section of the Code extends the power of the court beyond the rules laid down in *State vs. Great Northern Ry.* Co. and *Interstate Com. Comm. vs. Illinois Central R. R. Co., supra.*

It is urged that under the provisions of subdivision 5 of section 2140 the court may set aside the determination of the Commission as against the weight of evidence, regarding it the same as the verdict of a jury. The court had occasion to say in *People ex rel. Smith vs. Hoffman,* 166 N. Y. 462, 476, 60 N. E. 187, 191 (54 L. R. A. 597) in construing section 2140 of the Code of Civil Procedure, as applied to the determination of the board of examination under the Military Code (Laws 1898, c. 212):

'The review authorized does not substitute the judgment of the civil court for that of the military court upon the evidence or the merits, but inquires into jurisdiction of the subject-matter, the exercise

of authority in relation to the subject-matter according to law, the violation of any rule of law, to the prejudice of the relator, and the like * * *.'

The court at the Appellate Divison substituted its own judgment for that of the Public Service Commission in determining that the latter's order was unreasonable. This decision, if allowed to stand, will seriously hamper the Commissions in the discharge of their duties, and go far toward defeating the efforts of the Legislature to establish agencies to regulate the great public service corporations.

The order should therefore be reversed, and the order of the Public Service Commission reinstated, with costs in the Appellate Division and in this court."

The People, ex rel., vs. Edward E. McCall, et al., 113 N. E., 795.

We have quoted exhaustively from this opinion because it is believed to be the latest decision on the subject, and because it indicates very clearly the basis for the conclusion. The reasoning followed there would seem to apply even more strongly to our own Act and to the decisions of this Court in cases where it has been called upon to review findings by a chancellor.

The importance to the proper administration of the statute of the above principles relative to the respective provinces of the courts and commissions, is clearly recognized by the decision and Justice White's opinion in *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426. See also *B. & O. R. R. Co. vs. Pitcairn*

Coal Co., 215 U. S., 481; *Rob vs. B. & O. R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co. vs. P. R. R. Co.*, 230 U. S., 247; *Coal Co. vs. P. R. R. Co.*, 230 U. S. 304; *P. R. R. Co. vs. Coal Co.*, 237 U. S., 121; *P. R. Co. vs. Coal Co.*, 238 U. S., 456; *R. R. Co. vs. Tie Co.*, 234 U. S., 138, *Loomis vs. R. R. Co.*, 240 U. S., 43. See also *Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pa., 114.

It is thus well settled that legislation, such as the Public Service Company Act, giving a right of appeal from the determination and order of the Commission, which confers upon the appellate tribunals the power to reverse or remand such finding or order, intends to confer upon the court a supervisory power to determine, not whether the order as made would be the order which the court itself, if it were exercising administrative functions, would regard as a reasonable order to make, but whether the order was a reasonable exercise of the administrative discretion which the Commission, under the statute, possessed.

We submit therefore that acts which, like the Public Service Company Law, authorize the court to reverse decisions of the Commission which are found to be unreasonable or not in conformity with the law, are not intended to permit the court to become an appellate administrative body. The distinction between judicial and administrative actions on the question of the reasonableness of rates is not to be broken down because the legislature has established an appellate jurisdiction in the courts. The functions of the two branches of the government are still distinct and that of the court is even more judicial than is the function of appellate

courts to review the findings of referees, arbitrators, auditors or chancellors. There the courts will not disturb the findings except for manifest error or clear abuse of discretion, nor will they weigh the evidence or review it except in case of manifest and gross error. The question before the court in such case is whether there was any evidence to sustain the finding which is a judicial question, and this principle, we believe, has been entirely ignored by the Superior Court in its decision of this case.

Your Honors have repeatedly upheld this principle in the case of auditors and masters and have applied it directly to the decision of an appeal in a rate case in *Turtle Creek Borough vs. Pennsylvania Water Company*, 243 Pa., 401, in which you said:

> "The discussion of the testimony of these witnesses amounts to a demonstration that the learned chancellor carefully considered the question of value from every angle, and did not act arbitrarily or capriciously in fixing the valuation of defendant's properties. No doubt counsel for appellant believe that the court should have accepted the statements of their witnesses as the best evidence of value, but the court was not bound to accept their estimates of value as conclusive of the fact, but only to give it the weight to which it was entitled in connection with all the testimony in arriving at a just valuation. Upon the question of value the testimony was conflicting and it was the duty of the court to consider all of the relevant facts in fixing a fair valuation upon the properties. *It may be, as appellant contends, that the weight*

of the testimony would justify a higher valuation, but the question for decision here is whether there was such palpable error in the findings of fact as to warrant a reversal of the decree. Appellate courts do not reverse findings of fact by a court of first instance unless there be manifest error. This is the rule of all the cases, and, as we view it, is conclusive against appellant on this branch of the case at bar. The testimony was ample to sustain the conclusion reached, and this is the limit of our inquiry: *Rorabaugh's Est.*, 229 Pa. 377. It is not ground for reversal on the findings of fact that a different conclusion might have been warranted from the evidence, or that this court might have arrived at a different result if called upon to determine the fact as a court of first instance: *Plankington's Est.*, 212 Pa. 235. Our duty in reviewing findings of facts is to ascertain whether there was testimony, which, if believed, would sustain the findings: *Oil Well Supply Co. vs. Manufacturing Co.*, 234 Pa. 378." (Italics ours.)

The question before the lower court in that case was the unreasonableness of the proposed increase of charges exactly as it is in this case before the Commission and on appeal to your Honors the findings of fact by the lower court were not to be reversed except for manifest error; while in the present proceedings the legislature itself has said that the decision of its agent shall be *prima facie* evidence of its reasonableness.

In discussing the Public Service Company Law in another class of cases, your Honors have said in *New*

Brighton Borough vs. New Brighton Water Company, 247 Pa. 232, that

> "One of the purposes of the utilities act was to furnish in cases of the character of the one now before us, a more flexible procedure for ascertaining facts and reaching conclusions than were supplied by the set forms of pleading and procedure in the law courts * * * On the whole this act furnishes a complete and what should prove a satisfactory system in cases of this character, and thereunder all relevant facts * * * can be brought out and fully developed * * *"

And in *Bellevue Borough vs. Ohio Valley Water Company,* 245 Pa. 114, this court has recognized that it is the statutory policy of the law that the reasonableness of rates should be in the hands of the Commission. So long as this is the policy of the law it is unquestionably advisable that this special tribunal should have full authority and should not be reversed unless it clearly appears that its decisions are in the sense we have attempted to indicate above unreasonable or not in conformity with law.

We further contend that the Legislature having made the determinations of the Commission prima facie evidence of their reasonableness the Superior Court is authorized to reverse these determinations and remand them to the Commission only when they are shown to be unreasonable or not in conformity with law in the sense which we have outlined above. This brings us to the question of the right of the Superior Court to direct the Commission to reform its valuation in the

manner in which it has been directed to do so in this case.

The Public Srvice Company Law authorizes the Superior Court to remand the record to the Commission with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law, and we earnestly submit that this means that the order shall be such as shall appear to the Commission to be reasonable in view of the legal principles laid down by the court. It certainly cannot be taken to mean that the court, in a matter of valuation, shall decide the value of each particular item of property because there would then be no reason for sending the record to the Commission for an order. The order made under such circumstances would in no sense be the order of the Public Service Commission but would be its fiat issued at the direction of the Superior Court. Under such an interpretation of the Public Service Company Law the legislative power of making rates has passed directly to the Superior Court and the Commission has become simply the means by which the Superior Court puts into effect the rates which it has established.

No clearer example of the truth of this statement could be presented than that which is now before your Honors. Under the decree of the Superior Court it is possible for any one to take a lead pencil and in five minutes figure up exactly what the rates of the Ohio Valley Water Company shall be, or at least what the lowest valuation of the company shall be, because the Superior Court has allowed the Commission to fix the

going concern value without indicating the exact amount thereof, except to say that "the lowest amount fixed by the appellant's evidence would not be excessive value for this item." As to every other item of value the Superior Court has fixed it to the cent, so that its decree is not a sending back of the record to the Commission for it to make a reasonable order but a return of the record for the purpose of having a legislative agency do that which the judiciary is not authorized to do.

Possibly the Superior Court's treatment of the item interest during construction is as illustrative of our view of its action as anything else in the learned court's decree. The Commission had before it testimony as to the amount of this item in the original cost and testimony of engineers as to the amount which would be required to cover this item if the plant were reproduced to-day. The manner in which money would be expended during construction, the time during which various portions of the plant would remain unproductive, the rate which would have to be paid for this money, the gradual return to the company as parts of is plant came into operation before the whole plant was completed, and the rate at which this item should be figured, were all questions of fact placed before the Commission and sustained by evidence. After considering them all, the Commission arrived at an allowance for this item of value and yet the Superior Court decided that the Commission should not have exercised its discretion but should have accepted the testimony as to the reproduction cost new value of this particular item.

We respectfully assert that this is an entire misconception of the province of the court on appeal and that it is typical of the action of the Superior Court on every contested item of valuation. The learned court has not pointed out where the decision of the Commission is not in conformity with law, nor has it reversed the Commission because the findings of that body were unreasonable in the sense we have indicated above; it has simply said that as to each of these items in dispute reasonable men might differ and it will therefore substitute its judgment for that of the legislative agency created to pass upon these differences. We submit that the Superior Court is not authorized to fix the value on any item of property and that therefore its action in this case is contrary to the authority given it by the Public Service Company Law.

(2) THE JURISDICTION OF THE COMMISSION UPON A REHEARING OF THIS CASE AND THE RIGHT OF THE SUPERIOR COURT TO MODIFY, CONFINE AND RESTRICT THE SAME.

The Public Service Company Law requires the Superior Court to remand the record to the Commission with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law and we have attempted to indicate above the jurisdiction of the court under this provision of the act.

If the Superior Court is to pass judicially upon the action of the Commission and it reverses that action either because it is, in a judicial sense, unreasonable or

is otherwise not in conformity with law, the record will be returned to the Commission with the decree of the court pointing out the particulars in which the decision of the Commission is unreasonable or contrary to law. This unreasonableness will have at its foundation the failure of the Commission to act upon evidence, the fact that it acted upon incompetent evidence, that it decided against the clear weight of the evidence, and thus abused its discretion, or the fact that it has failed to apply a legal principle to its consideration of the case.

With such a decree of the Superior Court before it pointing out the principles which should guide the Commission in the consideration of the matter involved the Commission will then be in a position to apply those principles to the facts established by the evidence and in this way reach a reasonable decision which will fulfill the judicial requirements of the court and at the same time permit the Commission to exercise the administrative functions which have been delegated to it by the Legislature.

The Commission is clearly an administrative body empowered by the Legislature to determine certain facts which shall be the basis of its action in particular cases. It is to examine the facts and apply to them the principles which have been laid down by the Legislature and the court has no right to modify or restrict the jurisdiction of the Commission in carrying out the directions of the Legislature, except insofar as it can say that the Commission's decisions are, as a matter of law, unreasonable or contrary to law.

The Superior Court is not authorized to decide the weight which shall be given to the evidence by the Commission and the Public Service Company Law specifically negatives the idea that any one method of valuation shall be taken as a standard. Section 20 of Article V gives the Commission authority to determine every fact, matter or thing which in its judgment has or may have any bearing on fair value, and after enumerating a number of things which may be taken into considration by the Commission specifically provides that "these and any other elements of value shall be given such weight by the Commission as may be just and right in each case." The decision of the Superior Court in this proceeding takes away from the Commission all of its power to consider these various elements and restricts it not only to the reproduction cost of the property, but in some cases to the specific amounts testified to by particular witnesses.

We submit that if the case is sent back to the Commission its jurisdiction cannot be in any manner modified, confined or restricted by the decision of the Superior Court; the discretion must remain in the Commission and only the legal principles governing the exercise of that discretion can be laid down by the Superior Court; as was said by the Supreme Court of Appeals of New Jersey in the *West Jersey & Sea Shore* case, *supra,* the court will compel the Commission to proceed to judgment "but will never direct the character of the judgment to be rendered."

3. THE REVISORY JURISDICTION OF THE SUPREME COURT AND THE EXTENT TO WHICH IT SHOULD BE EXERCISED.

Section 30 of Article VI of the Public Service Company Law, as amended by the Act of July 11th, 1917, P. L. 808, provides that appeals to the Supreme Court

> "shall be taken and prosecuted in the same manner and with the same effect as is provided in other cases of appeal from the Superior to the Supreme Court."

From this we take it that

> "whenever a case is appealed to the Supreme Court from the Superior Court the appeal shall be taken from the judgment of the Superior Court, but the whole proceeding shall be brought thereby within the jurisdiction and power of the Supreme Court, who may enter therein such judgment, order or decree as may be just * * * and who may thereupon send the record either to the Superior Court or directly to the Court below, as the Supreme Court may consider advisable."
>
> Act—June 24th, 1895, Section 9, P. L. 212.

We therefore believe that your Honors have the widest and most comprehensive revisory jurisdiction which it is possible to grant, and that this jurisdiction may be exercised in the same manner in which your Honors would exercise your jurisdiction to correct errors in other cases.

The Act of May 20th, 1891, Section 2, P. L. 101, provides that

> "the Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from and to enter such judgment, order or decree in the case as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the Court below, and may order a verdict and judgment to be set aside and a new trial had."

And this act, together with the act above quoted relating to appeals from the Superior Court, give to the Supreme Court authority to judicially review any case brought before it and correct either directly or through the inferior tribunal any errors which may appear.

The constitution in Article V, Section 21, 1 Purd., 181, provides that

> "no duties shall be imposed by law upon the Supreme Court or any of the judges thereof except such as are judicial * * *";

so that the revisory jurisdiction of your Honors in cases appealed from the Commission, as in all other cases, is confined to a judicial review. The legislature never intended and probably has no authority to make your Honors a supreme administrative body to pass upon the actions of the Commission which are essentially legislative in their nature.

The making of rates is a purely legisative function and the action of the Commission under the authority given it by the legislature in ascertaining facts and applying to them the principles laid down by the legislature is the administration of legislative determinations. The revisory jurisdiction of your Honors should be confined to a determination of whether this legislative agency has acted within the scope of its authority, whether that authority has been exercised in the manner prescribed by law, and whether there has been such an abuse of discretion as would warrant your Honors in saying that the decision of the Commission is unreasonable and therefore contrary to law. Here again we are confronted with the question of the extent of the Court's review of the reasonableness of the Commission's action, and it seems to us that the general principles which have governed this Court's actions in reviewing findings of fact are particularly applicable in these cases. The inquiry is not whether the determination of fact is such as would have been made by the Court on the evidence produced, but whether the Commission had evidence before it which could have justified its conclusion. The principles have often been applied by your Honors in reviewing the findings of auditors, masters and referees, and have already been referred to in this argument.

On this principle, therefore, your Honors have before you the entire case for such decision as shall seem just, and we believe that your revisory jurisdiction should be exercised in this particular instance by a review of the entire proceedings. Such a review would involve a consideration of the testimony presented to

the Commission, but we think that this great labor is justified in this particular case because the principles involved have never been presented to this Court for decision under the Public Service Company Law.

Our objection to the decision of the Superior Court is in the main based upon two propositions:

(1) That the Superior Court has not acted as a judicial body in reviewing the decision of the Commission, but has substituted its judgment for that of the Commission; thereby constituting itself an administrative body empowered to make rates.

(2) That the Superior Court, has by its decision, laid down principles of valuation which are contrary to the provisions of the Public Service Company Law, economically unsound, and which depend upon the facts of each particular case, which facts the Commission alone is authorized to find.

It, therefore, seems to us that your Honor's revisory jurisdiction in this case should consist of a review of the exhaustive report of the Commission, in the light of the decision of the Superior Court, and we feel convinced that such a review will conclusively show that the Commission carefully considered all of the testimony referred to by the Superior Court and gave it such weight as it was entitled to. It will show that every element of value was carefully considered by the Commission and that the return allowed under the Commission's decision is in every sense just and reasonable, and it will also show that the decision of Su-

perior Court is based upon fundamental errors both of law and of fact as indicated above.

We respectfully suggest that a reversal of the order of the Superior Court and an affirmance of the report of the Commission will tend to fix the law in relation to rate-making much more definitely than if your Honors reversed the decree of the Superior Court and sent the case back to that Court for reconsideration under the principles which we have attempted to indicate above. In view of the importance of the decision in this case to rate regulation, we would suggest that your Honors point out not only the restrictions upon the jurisdiction of the Superior Court and the manner in which that court has erred in overlooking those restrictions, but also the fundamental and all-important power of the Commission in deciding upon facts, presented to it, as well as those principles of law which relate to the assigning of value to particular items of property. We feel confident that such an exercise of your Honors' revisory jurisdiction will remove all doubt as to the many questions involved in rate making, will establish the Commission as the legislative agent empowered to fix reasonable rates, and will result in a reversal of the decree of the Superior Court and an affirmance of the finding of the Commission.

Testimony Discussed by the Superior Court.

As we have indicated in the earlier part of this argument, we believe that the Superior Court in its decision of this case has substituted its judgment for that of the Commission, and we wish to point out par-

ticularly certain portions of the decision of the Superior Court which sustain this contention.

As we have pointed out, the Public Service Company Law enumerates a number of elements which may be considered by the Commission in determining the fair value of the property of a public utility. The Commission had before it testimony as to every one of these elements and they are thoroughly discussed in its report. The opinion of the Superior Court is a positive direction to the Commission to base its valuation on only one of these elements, namely, the reproduction cost new less depreciation, and we believe that this constitutes the fundamental error in the decision of that Court, except, of course, the error of substituting its judgment for that of the Commission.

The Superior Court says:

> "The present value represents more than the cost of reproduction, which is the present day cost of the real estate, machinery, equipment or plant, labor or installing or construction and putting in place to perform its various functions."

This idea is the very foundation of the Superior Court's decision and we submit that it is not sustained by the evidence, is unauthorized by any court decision and is directly contrary to the clear mandate of the Public Service Company Law.

In the Court's discussion of the value to be placed upon the Neville Island property, the Commission is directed to increase the value for rate making pur-

poses of that property from $48,800.00 to $100,000.00. The discussion in the decision of the Court shows that the theoretical reproduction cost of this piece of property is the only element which is to be considered. It is a determination to ignore the actual cost of the property in reaching a fair value, and to substitute the Court's opinion of what it would cost to reproduce the water supply for the opinion of the Commission. And after having determined for the Commission the reproduction cost of this particular item of property, the Court goes further and fixes the fair value, measuring it not by the testimony of any witness, but by the opinion of one of the Commissioners as to the value of it.

The Superior Court said, in discussing this property:

> "The Commission's value of $48,800 did not consider all the elements that tended to make up the value of this property. It is directed that the value be increased as indicated by this opinion."

This quotation indicates the fundamental error of the Superior Court in passing upon the facts as found by the Commission, for it clearly shows that the Court was of the opinion that the Commission had fixed the value of the Neville Island land at $48,800. There is nothing in the report of the Commission to justify this conclusion and it is distinctly stated in the report of the Commission that the $48,800 is not the fair value for ratemaking purposes, but is the Commission's conclusion as to what the reproduction cost new of the property would be. In arriving at the

fair value for rate-making of this piece of land, the Commission considered the fact that it had cost the company in 1904 $3,900; that a supply of like water could be obtained at other places in the vicinity probably in as abundant quantities as on this piece of land, and all the other testimony relating to its value, while the Superior Court seems to have considered nothing except the testimony as to the reproduction cost new, which testimony we have discussed at page 17 of the paper book in the Superior Court. We submit that the decision of the Superior Court on this item of value is typical of its action on every disputed item, is a decision on the weight of the evidence and a substitution of the judgment of that Court for the judgment of the Commission, which is unjustified by either the law or the facts.

In regard to the parallel lines of the Monongahela Water Company, the Commission, after considering a great deal of testimony, decided that they were useful in the public service to the extent of one-third of their capacity and, therefore, in arriving at its reproduction cost new it included a figure which represents one-third of the engineers' estimate of the reproduction cost new of these lines. The Superior Court directs the Commission to allow the entire reproduction cost new, substituting its judgment as to the useful lines for that of the Commission. This is clearly a fact which is peculiarly within the jurisdiction of the Commission to decide and one as to which there was comparatively little dispute, even the engineers for the water company agreeing that part of the parallel lines were not necessary and useful. The Court, however,

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takes the position that a utility company shall be allowed for everything which it purchases to do away with competition regardless of the fact that the property is not useful, and we submit that both the law and the facts are contrary to the decision of the Court in this matter.

The Superior Court's treatment of interest during construction is another example of its substitution of its judgment for that of the Commission. An allowance for interest during construction depends largely upon the time during which amounts expended for various pieces of property will be unproductive and the various rates at which interest will have to be paid on these particular sums. It is a matter peculiarly within the judgment of the Commission under the testimony, and for the Court to say that the Commission must accept the testimony of engineers as to the time of construction and apply the interest rate fixed by the Commission to the money expended during that time is to take away all discretion from the Commission. The rate of interest to be allowed is largely dependent upon the balancing of the length of time during which parts of the money will be invested and the rate which would have to be paid for that money, and yet the Superior Court refuses to allow the Commission to exercise any discretion in this matter.

We submit that the statements of the Superior Court relating to brokerage are economically unsound and are contrary to the decisions of this Court and many other courts that the value of the property used and

useful in the public service is the basis upon which fair rates are to be established. The Court recognizes that brokerage is the inducement which is offered to capital in order to secure its investment in the enterprise. In other words, it is an interest charge and yet it would have the amount of that inducement turned into capital and forever made the basis of charges against the public. If the promoters have seen fit to pay some sum for the money which they invest in a utility property, they should receive the return of that sum out of the reasonable return on their investment and not attempt to make the public pay a reasonable return on the investment and in addition a reasonable return on the cost of the money which makes up the investment. We have discussed this matter at page 26 of the paper book in the Superior Court and feel confident that the principle advanced by the Superior Court is contrary to law. The Court, however, again shows that it considers reproduction cost as the only basis for rate-making when it states in speaking of discount that:

> "When based on reproduction cost the discount is limited to *actual value* and no fictitious charge is allowed as it would be if calculated on an issue of stocks and bonds where the utility was created solely from the money received from the sale of bonds."

This is a statement that fair value shall include a theoretical discount based upon a theoretical cost of reproduction without any reference to the actual amount of money invested or the real history of the financing of the company. Under the theory, if a prop-

erty is built from the proceeds of full-paid capital stock those stockholders are to be allowed a fair return on that investment and a fair return on some undetermined amount which represents what it would have cost them to borrow the money to purchase the stock. An allowance for discount has no place in fair value and must be covered, if at all, in the rate of return.

In conclusion, therefore, we respectfully submit:

(1) That the Superior Court has entirely misconceived its function as a judicial body and has reversed what the Legislature has made a *prima facie* reasonable determination by substituting its judgment for that of the Commission.

(2) That in directing the Commission to reform its valuation so as to include specific amounts found by the Court, the Superior Court is performing a legislative function unauthorized by law.

(3) That the principles laid down by the Court as to the valuation of specific items are unsound, contrary to law, and directly involve decision as to the weight of the evidence in particular cases, which decision is primarily for the Commission.

(4) That the Superior Court has erred in assuming that the fair value found by the Commission is based entirely upon the reproduction cost new in this case and

in directing the Commission to consider that element alone in arriving at its fair value.

Respectfully submitted,

BERNE H. EVANS,
Counsel.

I hereby certify that cases cited herein from other than Pennsylvania Official Reports are not to be found therein.

BERNE H. EVANS.

Office Supreme Court, U. S.
FILED
FEB 24 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

NO. 128 OCTOBER TERM, 1919.

OHIO VALLEY WATER COMPANY, Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, Defendants in Error.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR ON RE-ARGUMENT.

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

Smith Bros. Co. Inc., Legal Printers, 407-409 Grant Street, Pittsburgh, Pa.

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IN THE

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ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR ON RE-ARGUMENT.

In this case, in error to the Supreme Court of the State of Pennsylvania, this Court, on January 12, 1920, made the following order:

"PER CURIAM:

Restored to the docket for reargument. The attention of counsel is directed to the question of whether under the State law the right to review

the action of the commission was limited by the State statutes to the particular remedy which was here resorted to, or whether such statutes left open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the commission."

In this brief, we will, so far as possible, refrain from reiterating arguments presented in our original and reply briefs filed prior to the first argument and confine ourselves to questions suggested by the above order. We do not wish to be regarded, however, as withdrawing any of our former contentions, since we believe them to be valid and not damaged, but rather supported, by what we shall have to say here. Indeed, authorities on the question to which the attention of counsel is directed by the order were cited in our original brief (pp. 61-64). We did not, however, deem it necessary to elaborate, because we thought our position too well established to be contested. It was not contested at the first argument by any of the learned counsel for the appellees, and we are not advised now what the nature of their argument regarding it will be. We shall, however, submit to the Court the considerations bearing upon the question which our study has suggested, dividing our argument into three parts.

In the first part, we shall quote the relevant provisions of the Pennsylvania Public Service Company Law.

In the second part, we shall maintain that under the Pennsylvania law the right to review the action of the Public Service Commission in this case was limited to the remedy by appeal to the Superior Court which was resorted to.

In the third part, we shall maintain that, even if the Pennsylvania law left open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the Commission, nevertheless the plaintiff in error in this case has been deprived of its liberty and property without due process of law by the Public Service Company Law as construed by the Supreme Court of Pennsylvania.

I.

The Relevant Provisions of the Statute.

(The provisions of the original Public Service Company Law of 1913 are given first, then the amendments made in 1915, and finally the amendments made in 1917.)

THE ACT OF 1913.

(Pamphlet Laws, 1913, pp. 1374 ff.; 6 Purdon's Digest, 13th ed., pp. 7206 ff.)

No. 854

AN ACT

Defining public service companies; and providing for their regulation by prescribing and defining their duties and liabilities; prescribing, defining, and limiting their powers and regulating their incorporation, and, to a limited extent, regulating municipal corporations engaged or about to engage in the business of public service companies; creating and establishing a Public Service Commission for the regulation aforesaid; prescribing and defining the power and duties of such Commission and its officers, including the exclusive power to regulate the construction, alteration, re-location, or abolition of the crossings of railroad corporations, street railway corporations, or other public service companies, and of public highways by the tracks or other facilities of said companies; providing for the ascertainment by the Commission of the expense and damages resulting from such construction, alteration, re-location, or abolition, and for the payment of such expense and damages, severally or proportionately, by the public service companies interested, the State, or municipal corporation concerned, and giving persons whose property is thereby taken, injured, or destroyed, authority to sue the Commonwealth for damages in such cases; providing for the terms, salaries, and compensation of the members of the commission, its officers, counsel, and employes; prescribing and regulating the practice and procedure before such commission, and upon appeal and judicial review of its orders and determinations by the courts

of common pleas; and giving the court of common pleas of Dauphin County exclusive jurisdiction of such appeals in certain cases, and of all injunctions, mandamus, or other appropriate proceedings to enforce the provisions of this act and the orders of the commission, and to restrain such orders, subject to an appeal to the Supreme Court; prescribing penalties, fines, and imprisonment for the violation of the provisions of this act and for the violation of the orders of said commission; making it the duty of the Public Service Commission to enforce the provisions of the act approved the nineteenth day of June, one thousand nine hundred and eleven, entitled "An act to promote the safety of travelers and employes on railroads, by compelling common carriers by railroad to properly man their trains," by amending section nine thereof; repealing the act approved the thirty-first day of May, one thousand nine hundred and seven, which provided for the appointment of the Pennsylvania State Railroad Commission; and sections one and two of the act, approved the fourth day of June, one thousand eight hundred and eighty-three, entitled "An act to enforce the provisions of the seventeenth article of the Constitution, relative to railroads and canals;" and an act, entitled "To provide the maximum car service charges, including car storage charges, that railroad companies and corporations, or associations, may charge and collect on each car loading, and not unloaded within the free time for unloading cars, and fixing the free time that shall be allowed for unloading cars," approved twenty-fourth day of May, Anno Domini one thousand nine hundred and seven; and the proviso of clause three and the provisos of clause seven of section thirty-four of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, and all other legislation inconsistent with or supplied by this act.

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ARTICLE VI.

Practice and Procedure before the Commission and upon Appeal.

* * * * * * *

Section 17.* Within thirty days after the filing of any finding or determination by the commission, or after the date of service of any order—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the preceedings (*sic*) affected thereby may appeal therefrom to the Court of Common Pleas of Dauphin County: Provided, That there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided. The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an appeal from the award of damages or compensation by the commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said Court of Common Pleas of Dauphin

*Amended; vide infra, p. 19.

County. If an appeal be made to any court other than the Court of Common Pleas of Dauphin County, the case shall be proceeded with therein in accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the commission of damages or compensation for property taken, injured, or destroyed, where the commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal may be pending shall prescribe. All appeals to the Court of Common Pleas of Dauphin County shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the commisison; which petition shall be accompanied by a copy of the original complaint, if any, filed with the commission, as well as a copy of the ruling, determination, or order of the commission appealed from; and shall also be accompanied by an affidavit of the party or parties appellant, or if its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition.

Section 18.* The commission shall be immediately notified in writing by the appellant or appellants of the taking of an appeal, and within thirty days . fter service of such notice shall certify under its official seal to the proper court of common pleas, as hereinabove provided, the record of the said proceedings; which record shall include the testimony taken therein, the findings of fact, if any, of the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission. The cost of preparing and certifying such record shall be paid to the commission by the appellant or appellants, and taxed as part of the costs in the case, to be paid as directed by the court upon the final determination of the appeal.

Section 19. No appeal from any order of the commission (except as hereinafter provided) shall in any case operate as a supersedeas of the order appealed from, unless the aforesaid proper court of common pleas shall, by an interlocutory order, make said appeal a supersedeas; which interlocutory order shall be made only after such notice to the commission and other parties of record as the court may direct, and after a hearing upon said application for an interlocutory order of supersedeas. Upon the granting of a supersedeas upon the application of a public service company in any case (except as hereinafter provided), the court may, in its discretion, require the filing of a bond the Commonwealth, for the use of all parties aggrieved, in such

*Amended; vide infra, p. 32.

sum and conditioned as the court may by its order direct, or may grant the supersedeas upon such other terms and conditions as the court in its discretion may prescribe: Provided, however, That in all cases of appeal by a public service company from an order of the commission establishing, changing, or altering, or in any manner affecting, the prices, rates, joint rates, tolls or charges for any service, such appeal shall operate as a supersedeas upon the filing of a bond to the Commonwealth, in the said court, by the said public service company, for the use of all parties so damaged by the failure of such company to comply with the order appealed from, during the period of such supersedeas. Said bond to be in such sum as shall be fixed by the court, and with sureties to be approved by the court, shall be conditioned for the repayment to all such aggrieved parties of any excess over the rate or charge fixed by the commission, which shall be received by such public service company after the making of such order by the commission, if the said order shall be finally affirmed, and may also contain such further conditions as the court may order and direct.

Section 20. Upon the petition of the commission the said court may order the complainant or complainants in the original complaint to be added to the record as a party or parties defendant, and such parties shall be permitted to join in the defense of the order of the commission at issue.

The court may also, upon application by petition and cause shown, permit any person or corporation to intervene in the said proceeding and be added as a party plaintiff or defendant therein.

Section 21. An answer shall be filed by the commission within thirty days after the service of notice upon it of the taking of an appeal. Leave may also be given by the court to any other party to the record to file an answer. Upon the filing of an answer by the commission the case shall be considered at issue, and a hearing shall be held before said court as hereinafter provided, without further pleadings. Copies of the petition and answer shall be served upon the opposite party or parties within five days after filing the same.

Section 22. At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law.

Section 23. In all such cases the orders of the commission shall be prima facia (*sic*) evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants; and the notes of testimony taken before the commission or any of the members thereof, duly certified under its seal, and filed as aforesaid as a part of the record, shall be considered by the court as the testimony in the case.

Section 24. If the court shall, upon the record find that the order appealed from is reasonable and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, upon the record, find that the order appealed from is unreasonable or based upon the incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in con-

formity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law. In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon before the commission, it shall remand the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of all costs.

Section 25. No evidence shall be received at the hearing on any appeal, but if any party shall satisfy the court that evidence has been discovered since the hearing before the commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the commission, with directions to take such after-discovered evidence, and, after consideration thereof, enter and file such order as shall in the opinion of the commission be reasonable and in conformity with law, from which order an appeal shall lie as in the case of any other final order.

Section 26. In all actions and proceedings in said court arising under this act process shall be served and the practice and rules of evidence shall be the same as in civil action, except as otherwise herein provided.

Section 27. Every sheriff or other officer empowered to execute civil process shall execute any process issued under the provisions of this act, and shall receive such compensation therefor as may be prescribed by law for similar services.

Section 28. All appeals from the orders of the commission to the said court shall take precedence upon the calendars of the said court over all other civil actions, except election cases and suits for wages.

Section 29.* Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the Court of Common Pleas of Dauphin County.

Section 30.** Any party to the record aggrieved by the final judgment, order, or decree of the aforesaid proper court of common pleas, may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court.

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*Amended; vide infra, p. 23.
**Amended; vide infra, pp. 24, 34.

Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The Court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.

Section 32.* Every public service company, its officers, agents, and employes, affected by any final order of the commission or any final order of the Court of Common Pleas of Dauphin County, or of the Supreme Court, shall obey, observe and comply with such order, and with the terms and conditions thereof, so long as the same shall be and remain in force.

Section 33.** Whenever the commission shall be of opinion that any public service company is violating or is about to violate any provision of this act; or has done or is about to do any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect or refuse, to perform, any duty enjoined upon it by this act; or has failed, omitted, neglected or re-

*Amended; vide infra, p. 24.
**Amended; vide infra, p. 25.

fused, or is about to fail, omit, neglect, or refuse, to obey any lawful requirement or final order made by the commission; or any final judgment, order, or decree made by the Court of Common Pleas of Dauphin County, or the Supreme Court—then, and in every such case, the commission may, by its counsel or assistant counsel, institute in the name of the commission, in the Court of Common Pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the orders of the commission, and to enforce obedience thereto; and the said court of common pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.

Section 34. The Attorney General, in addition to the exercise of the powers and duties now conferred upon him by law, shall also, upon request of the commission, or of his own motion, proceed, in the name of the Commonwealth, by mandamus, injunction, or quo warranto, or other appropriate remedy at law or in equity, to restrain violations of the provisions of this act, or of the orders of the commission, or of the judgment, orders, or decrees of said courts or to enforce obedience thereto.

Section 35.* If any public service company shall violate any of the provisions of this act, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined

*Amended; vide infra, p. 26.

upon it by this act; or shall fail, omit, neglect, or refuse to obey, observe, and comply with any final direction, requirement, determination, or order made by the commission; or to comply with any final judgment, order, or decree made by the Court of Common Pleas of Dauphin County or the Supreme Court,—such public service company, for such violation, omission, failure, neglect, or refusal shall forfeit and pay to the Commonwealth of Pennsylvania the sum of fifty dollars; to be recovered by an action of assumpsit, instituted in the name of the Commonwealth of Pennsylvania, in the said Court of Common Pleas of Dauphin County, which court is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.

In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or other person acting for or employed by any such public service company, acting within the scope of his employment, shall, in every case, be deemed to be the violation, omission, failure, neglect, or refusal of such public service company.

Section 36.* Each and every day's continuance in the violation of any final direction, requirement, determination, or order of the commission, or of any final judgment, order, or decree made by the Court of Common Pleas of Dauphin County, or by the Supreme Court, shall be a separate and distinct offense: Provided however, That if any interlocutory order of super-

*Amended; vide infra, p. 28.

sedeas or a preliminary injunction be granted, no penalties shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direction, requirement, determination, or order, or decree, so superseded or enjoined, for the period of time such order or supersedeas or injunction is in force.

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Section 39.* Any person, whether an officer, agent, or employe of any public service company or not, or any corporation, who shall knowingly fail, omit, neglect, or refuse to obey, observe, and comply with any final order, direction, or requirement of the commission, or with any final order or decree of the said Court of Common Pleas of Dauphin County, or of the Supreme Court; or who shall knowingly procure, aid, or abet any such violation, omission, failure, neglect, or refusal,—shall be guilty of a misdemeanor, and upon conviction thereof in any court of quarter sessions of competent jurisdiction shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not less than one month, nor more than twelve months, either or both, at the discretion of the court; and upon conviction of any subsequent offense shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than eighteen months, either or both, at the discretion of the court.

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*Amended; vide infra, p. 29.

Section 42. All suits, remedies, prosecutions, penalties, and forfeitures provided for or accruing under this act shall be cumulative.

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Section 51. The act, entitled "An act to provide for the appointment of a Railroad Commission; prescribing the membership of said commission, the manner and term of the appointment of its members; defining their powers and duties with reference to common carriers, and in relation to making recommendations to the Attorney General and Secretary of Internal Affairs concerning the regulation, control, and management of common carriers within the Commonwealth; defining what the term 'common carrier' shall include: providing for the appointment of subordinate officers and the employment of expert and clerical employes by said commission; fixing the salaries of the members of said commission and its subordinate officers; providing for the compensation of its employes; limiting the annual expense of said commission; and making an appropriation for the payment thereof," approved the thirty-first day of May, Anno Domini one thousand nine hundred and seven (Pamphlet Laws, three hundred and thirty-seven), be and the same is hereby, repealed; said repeal to take effect the first day of July, nineteen hundred and thirteen; and sections 1 and 2 of the act, approved the fourth day of June, one thousand eight hundred and eighty-three, entitled "An act to enforce the provisions of the seventeenth article of the Constitution relative to railroads and canals;" and the act, approved May twenty-fourth,

one thousand nine hundred and seven, entitled "An act to provide the maximum car service charges, including car storage charges, that railroad companies and corporations, or associations, may charge and collect on each car loading and not unloaded within the free time for unloading of cars, and fixing the free time that shall be allowed after unloading cars;" and the proviso of clause three, and the provisos of clause seven of section thirty-four, of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four (Pamphlet Laws, seventy-three); and all other acts or parts of acts, inconsistent herewith, or supplied hereby, be, and the same are also hereby, repealed: Provided, That the repeal of sections one and two of said act of June four, one thousand eight hundred and eighty-three, shall not affect actions for violation of said act of June four, one thousand eight hundred and eighty-three, instituted prior to the passage of this act.

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APPROVED—The 26th day of July, A. D. 1913.

JOHN K. TENER.

AMENDMENTS OF 1915.

(Pamphlet Laws, 1915, p. 779; Purdon's Digest, ubi supra.)

No. 345

AN ACT

To amend section four of article four, and sections seventeen, twenty-nine, thirty, thirty-two, thirty-three, thirty-five, thirty-six, and thirty-nine of article six, of an act known as The Public Service Company Law, approved the twenty-sixth day of July, Anno Domini one thousand nine hundred and thirteen (Pamphlet Laws, thirteen hundred and seventy-four), so as to authorize The Public Service Commission of the Commonwealth of Pennsylvania to appoint examiners to take testimony and evidence in any locality in the Commonwealth designated by the commission; and to provide for the taking of appeals from the findings, determinations, or orders of the commission to the Superior Court, instead of to the court of common pleas of Dauphin County; vesting in the Superior Court the jurisdiction to hear and determine said appeals, which is now vested in said court of common pleas of Dauphin County, the same to be subject to an appeal to the Supreme Court; and so as to make the other necessary changes, due to the said substitution of the Superior Court of Pennsylvania for the court of common pleas of Dauphin County, as the court by which appeals from the findings, determinations, and orders of the commission shall be determined.

* * * * * * *

Section 3. That section seventeen of article six of said act, which reads as follows:—

"Section 17. Within thirty days after the filing of any finding or determination by the commission, or after the date of service of any order,—unless an application

for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the *court of common pleas of Dauphin County*: Provided, That there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided. The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an appeal from the award of damages or compensation by the commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said *court of common pleas of Dauphin County*. If an appeal be made to any court other than *the court of common pleas of Dauphin County*, the case shall be proceeded with therein accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the commission of damages or compensation for property taken, injured, or destroyed, where the commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal

may be pending shall prescribe. All appeals to the *court of common pleas of Dauphin County* shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the commission; which petition shall be accompanied by a copy of the original complaint, if any, filed with the commission, as well as a copy of the ruling, determination, or order of the commission appealed from; and shall also be accompanied by affidavit of the party or parties appellant, or if its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition," be and the same is hereby amended so as to read as follows:—

Section 17. Within thirty days after filing of any finding or determination by the commission, or after the date of service of any order,—unless an application for a rehearing may be pending, and then within thirty days after the refusal of such application,—or the entry of an order modifying, amending, rescinding, or affirming the original finding, determination, or order, any party to the proceedings affected thereby may appeal therefrom to the *Superior Court*: Provided, That there shall be no appeal from any order for reparation made by the commission, but the suit may be brought as hereinbefore provided. The said court is hereby clothed with exclusive jurisdiction throughout the Commonwealth for the purpose of hearing and determining any and all said appeals: Provided, That in case of an

appeal from the award of damages or compensation by the commission, under any of the provisions of this act, the appeal shall, in case any party is entitled to demand a jury trial under section eight of article sixteen of the Constitution of this Commonwealth, be to the courts of the proper county thereof, but in all other cases shall be to the said *Superior Court*. If an appeal be made to any court other than the Superior Court, the case shall be proceeded with therein in accordance with the practice and procedure made and provided in such cases. In case of any appeal from the award by the commission of damages or compensation for property taken, injured, or destroyed, where the commission shall have power to apportion the amount thereof among, or direct the payment thereof by, any public service companies or municipal corporations concerned, any such public service company or municipal corporation may intervene and be heard in the trial of such appeal, under such rules and regulations as the court in which the said appeal may be pending shall prescribe. All appeals to the *Superior Court* shall be by petition to said court, setting forth specifically and concisely the error or errors assigned to the finding, determination, or order of the commision; which petition shall be accompanied by a copy of the original complaint, if any, filed with the commission, as well a copy of the ruling, determination, or order of the commission appealed from; and shall also be accompanied by affidavit of the party or parties appellant, or of its, his, her, or their agent or attorney, that the appeal is not taken for the purpose of delay, but because the appellant or appellants verily believe that injustice has

been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition.

That section twenty-nine of article six of said act, which reads as follows:

"Section 29. Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken, such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the *court of common pleas of Dauphin County,*" be and the same hereby is amended so as to read as follows:—

Section 29. Nothing in this act contained shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or of the United States, but in every such case such right of trial by jury shall remain inviolate: Provided, however, That when any appeal is taken such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the *Superior Court.*

That section thirty of article six of said act, which reads as follows:—

"Section 30. Any party to the record, aggrieved by the final judgment, order, or decree of the aforesaid *proper court of common pleas,* may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court," be and the same hereby is amended so as to read as follows:—

Section 30.* Any party to the record, aggrieved by the final judgment, order, or decree of the aforesaid *Superior Court,* or of the court of the county, whenever under the provisions of this act an appeal may in the first instance be taken to said court, may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court *from the courts of common pleas of the Commonwealth.*

That section thirty-two of article six of said act, which reads as follows:—

"Section 32. Every public service company, its officers, agents, and employes, affected by any final order of the commission or any final order of the *court of common pleas of Dauphin County,* or of the Supreme Court, shall obey, observe, and comply with such order, and with the terms and conditions thereof, so long as the same shall be and remain in force," be and the same hereby is amended so as to read as follows:—

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*Amended; vide infra, p. 34.

Section 32. Every public service company, its officers, agents, and employes, affected by any final order of the commission or any final order of the *Superior Court,* or of the Supreme Court, shall obey, observe, and comply with such order, and with the terms and conditions thereof, so long as the same shall be and remain in force.

That section thirty-three of article six of said act, which reads as follows:—

"Section 33. Whenever the commission shall be of opinion that any public service company is violating or is about to violate any provision of this act; or has done or is about to do any act, matter, or thing herein prohibited or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to obey any lawful requirement or final order made by the commission; or any final judgment, order, or decree made by the *court of common pleas of Dauphin County* or by the Supreme Court,—then, and in every such case, the commission may, by its counsel or assistant counsel, institute in the name of the commission, in the court of common pleas of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the orders of the commission, and to enforce obedience thereto; and the said court of common

pleas is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions," be and the same hereby is amended so as to read as follows:—

Section 33. Whenever the commission shall be of opinion that any public service company is violating or is about to violate any provision of this act; or has done or is about to do any act, matter, or thing herein prohibited, or declared to be unlawful; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or has failed, omitted, neglected, or refused, or is about to fail, omit, neglect, or refuse, to obey any lawful requirement or final order made by the commission; or any final judgment, order, or decree made by the *Superior Court* or by the Supreme Court,—then and in every such case the commission may, by its counsel, or assistant counsel, institute in the name of the commission, in the court of common pleas of of Dauphin County, injunction, mandamus, or other appropriate legal proceedings, to restrain such violations of the provisions of this act, or of the orders of the commission, and to enforce obedience thereto; and the said court of common pleas is herby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.

That section thirty-five of article six of said act, which reads as follows:—

"Section 35. If any public service company shall violate any of the provisions of this act, or shall do

any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or shall fail, omit, neglect, or refuse to obey, observe, and comply with any final direction, requirement, determination, or order made by the commission; or to comply with any final judgment, order, or decree made by the *court of common pleas of Dauphin County* or the Supreme Court,—such public service company, for such violation, omission, failure, neglect, or refusal shall forfeit and pay to the Commonwealth of Pennsylvania the sum of fifty dollars; to be recovered by an action of assumpsit, instituted in the name of the Commonwealth of Pennsylvania, in the said court of common pleas of Dauphin County, which court is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.

"In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or other person acting for or employed by any such public service company, acting within the scope of his employment, shall in every case, be deemed to be the violation, omission, failure, neglect, or refusal of such public service company," be and the same hereby is amended so as to read as follows:—

Section 35. If any public service company shall violate any of the provisions of this act, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse, to perform any duty enjoined upon it by this act; or shall fail, omit, neglect, or refuse to obey, observe, and comply with any final direc-

tion, requirement, determination, or order made by the commission; or to comply with any final judgment, order, or decree made by the *Superior Court* or the Supreme Court,—such public service company, for such violation, omission, failure, neglect, or refusal shall forfeit and pay to the Commonwealth of Pennsylvania the sum of fifty dollars; to be recovered by an action of assumpsit instituted in the name of the Commonwealth of Pennsylvania, in the court of common pleas of Dauphin County, which court is hereby clothed with exclusive jurisdiction throughout the Commonwealth to hear and determine all such actions.

In construing and enforcing the provisions of this section, the violation, omission, failure, neglect, or refusal of any officer, agent, or other person acting for or employed by any such public service company, acting within the scope of his employment, shall, in every case be deemed to be the violation, omission, failure, neglect, or refusal of such public service company.

That section thirty-six of article six of said act, which reads as follows:—

"Section 36. Each and every day's continuance in the violation of any final direction, requirement, determination, or order of the commission, or of any final judgment, order, or decree made by the *court of common pleas of Dauphin County*, or by the Supreme Court, shall be a separate and distinct offense: Provided, however, That if any interlocutory order of supersedeas or a preliminary injunction be granted, no penalties shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direc-

tion, requirement, determination, or order, or decree, so superseded or enjoined, for the period of time such order or supersedeas or injunction is enforced," be and the same hereby is amended so as to read as follows:—

Section 36. Each and every day's continuance in the violation of any final direction, requirement, determination, or order of the commission, or of any final judgment, order, or decree made by the *Superior Court,* or by the Supreme Court, shall be a separate and distinct offense: Provided, however, That if any interlocutory order of supersedeas or a preliminary injunction be granted, no penalty shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direction, requirement, determination, or order, or decree, so superseded or enjoined, for the period of time such order or supersedeas or injunction is in force.

That section thirty-nine of article thirty-six of said act, which reads as follows:

"Section 39. Any person, whether an officer, agent, or employe of any public service company or not, or any corporation, who shall knowingly fail, omit, neglect, or refuse to obey, observe, and comply with any final order, direction or requirement of the commission or with any final order of (*sic*) decree of the said *court of common pleas of Dauphin County,* or of the Supreme Court; or who shall knowingly procure, aid, or abet any such violation, omission, failure, neglect, or refusal,—shall be guilty of a misdemeanor, and upon conviction thereof in any court of quarter sessions of competent jurisdiction shall be punished by a fine of not

more than five hundred dollars, or by imprisonment in the county jail for not less than one month, nor more than twelve months, either or both, at the discretion of the court; and upon conviction of any subsequent offense shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than eighteen months, either or both, at the discretion of the court," be and the same hereby is amended so as to read as follows:—

Section 39. Any person, whether an officer, agent, or employe of any public service company or not, or any corporation, who shall knowingly fail, omit, neglect, or refuse to obey, observe, and comply with any final order, direction, or requirement of the commission, or with any final order or decree of the said *Superior Court* or of the Supreme Court; or who shall knowingly procure, aid, or abet any such violation, omission, failure, neglect, or refusal,—shall be guilty of a misdemeanor, and upon conviction thereof in any court of quarter sessions of competent jurisdiction shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not less than one month, nor more than twelve months, either or both, at the discretion of the court; and upon conviction of any subsequent offense shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail for not less than three months, nor more than eighteen months, either or both, at the discretion of the court.

APPROVED—the 3d day of June, A. D. 1915.

MARTIN G. BRUMBAUGH.

AMENDMENTS OF 1917.

(Pamphlet Laws, 1917, p. 808.)

No. 311.

AN ACT

To amend an act known as The Public Service Company Law, approved the twenty-sixth day of July, Anno Domini one thousand nine hundred and thirteen (Pamphlet Laws, thirteen hundred and seventy-four), as amended by an act, entitled "An act to amend section four of article four, and sections seventeen, twenty-nine, thirty, thirty-two, thirty-three, thirty-five, thirty-six, and thirty-nine of article six, of an act known as The Public Service Company Law, approved the twenty-sixth day of July, Anno Domini one thousand nine hundred and thirteen (Pamphlet Laws, thirteen hundred and seventy-four), so as to authorize The Public Service Commission of the Commonwealth of Pennsylvania to appoint examiners to take testimony and evidence in any locality in the Commonwealth designated by the commission; and to provide for the taking of appeals from the findings, determinations, or orders of the commission to the Superior Court, instead of to the court of common pleas of Dauphin County; vesting in the Superior Court the jurisdiction to hear and determine said appeals, which is now vested in said court of common pleas of Dauphin County, the same to be subject to an appeal to the Supreme Court; and so as to make the other necessary changes, due to the said substitution of the Superior Court of Pennsylvania for the court of common pleas of Dauphin County, as the court by which appeals from the findings, determinations, and orders of the commission shall be determined," approved the third day of June, Anno Domini one thousand nine hundred and fifteen (Pamphlet Laws, seven hundred and seventy-nine); so as to vest in the Superior Court the jurisdiction to hear and determine all appeals from the findings, determinations, and orders, of The Public Service Commission which were taken prior to the third day of June, Anno Domini one thousand nine hundred and fifteen, to the court of common pleas of Dauphin County, and which are undisposed of by that court; and so as to limit the time for taking appeals to the Supreme Court, and to define the conditions under which appeals may hereafter be taken, from the judgment, order, or decree of the Superior Court to the Supreme Court, in all cases in which appeals have been or may be taken from the findings, determinations, or orders of The Public Service Commission.

Section 1. Be it enacted, &c., That section eighteen, article six, of an act known as The Public Service Company Law, approved the twenty-sixth day of July, Anno Domino one thousand nine hundred and thirteen (Pamphlet Laws, thirteen hundred and seventy-four), which reads as follows:—

"Section 18. The commission shall be immediately notified in writing by the appellant or appellants of the taking of an appeal, and within thirty days after service of such notice shall certify under its official seal to the proper court of common pleas, as hereinabove provided, the record of said proceedings; which record shall include the testimony taken therein, the findings of fact, if any, of the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission. The cost of preparing and certifying such record shall be paid to the commission by the appellant or appellants, and taxed as part of the costs in the case, to be paid as directed by the court upon the final determination of the appeal," be, and the same is hereby, amended to read as follows:—

Section 18. The commission shall be immediately notified in writing by the appellant or appellants of the taking of an appeal, and within thirty days after service of such notice shall certify, under its official seal, to the proper court, as hereinabove provided, the record of the said proceedings; which record shall include the evidence taken therein, the findings of facts, if any, of the commission based upon such evidence, a

copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission. The cost of preparing and certifying such record shall be paid to the commission by the appellant or appellants, and taxed as part of the costs in the case, to be paid as directed by the court upon the final determination of the appeal.

All appeals from the findings, determinations, and orders of The Public Service Commission, entered in the court of common pleas of Dauphin County before the third day of June, Anno Domini one thousand nine hundred and fifteen, and undisposed of by said court of common pleas of Dauphin County, shall be heard and disposed of by the Superior Court, in the same manner and with like effect as though the said act of the third day of June, Anno Domini one thousand nine hundred and fifteen, amending The Public Service Company Law of July twenty-sixth, Anno Domini one thousand nine hundred and thirteen, had applied to such appeals, and as though said appeals had been taken thereunder after the enactment of said amendatory act. Jurisdiction is hereby conferred upon the Superior Court to hear and dispose of all such appeals, under and in accordance with the provisions of said amendatory act of the third day of June, Anno Domini one thousand nine hundred and fifteen, subject to appeal to the Supreme Court as hereinafter provided, as in all cases of appeal from the findings, determinations, and orders of The Public Service Commission.

Immediately upon the approval of this act, the court of common pleas of Dauphin County shall certify the records in said pending and undisposed of appeals to the Superior Court, which shall proceed to hear and determine the same.

Section 2. That section thirty of article six of said act, known as The Public Service Company Law, as amended, which reads as follows:—

"Section 30. Any party to the record aggrieved by the final order, judgment, or decree of the aforesaid Superior Court, or of the court of the county, whenever under the provisions of this act an appeal may in the first instance be taken to said court, may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court from the courts of common pleas of the Commonwealth," be, and the same hereby is, amended so as to read as follows:—

Section 30. Within thirty days after the entry of any final judgment, order, or decree of the aforesaid Superior Court, any party to the record, aggrieved thereby, may appeal therefrom to the Supreme Court, if the jurisdiction of the Superior Court is in issue, or if the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States, or if the case involves the construction or application of the Constitution of Pennsylvania, or if the appeal to the Supreme Court be specially allowed by the Superior Court itself, or

by any one justice of the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and with the same effect, as is provided in other cases of appeal from the Superior Court to the Supreme Court.

Any party to the record, aggrieved by the final judgment, order, or decree of the court of the county, whenever under the provisions of this act an appeal may in the first instance be taken to said court, may, within thirty days after the entry of such final judgment, order, or decree, appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form, and with the same effect, as is provided in other cases of appeal to the Supreme Court from the courts of common pleas of the Commonwealth.

The provisions of this section shall apply to all cases determined by The Public Service Commission, whether on appeal determined or undetermined by the Superior Court, or by the aforesaid court of the county, in which appeals have not been taken to the Supreme Court prior to the approval of this act, as well as to all other and future appeals from the findings, determinations, and orders of the said Comsion:

Provided, however, That in cases in which, on appeal from The Public Service Commission, the Superior Court or the aforesaid court of the county has entered its final judgment, order, or decree, prior to the approval of this act, and in which no appeal to the Supreme Court has been taken prior to the approval of

this act, the thirty-day period, within which the appeal to the Supreme Court under the provisions of this section must be taken, shall be computed from the date of the approval of this act.

APPROVED—The 11th day of July, A. D. 1917.

MARTIN G. BRUMBAUGH.

II.

Under the State Law the Right to Review the Action of the Commission was Limited to the Particular Remedy which was Here Resorted to.

This proposition may be divided into two parts—(1) that under the provisions of the Pennsylvania Public Service Company Law the right to review the action of the Commission was limited in this case to an appeal to the Superior Court, which was resorted to by the plaintiff in error; (2) that no other remedy for the purpose than that granted by the Public Service Company Law was open in the courts of Pennsylvania.* We shall treat of these in order.

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*Of course, we have reference only to the State courts, not to the Federal. The language of the statute is general. It has been given, as we contend, such a construction in this case as to render it unconstitutional. But we shall not attempt to argue that the Supreme Court of Pennsylvania has said or would say that the Federal courts, entertaining jurisdiction because of a question of confiscation under the Fourteenth Amendment, such as that here raised, must be so confined in their judicial inquiry as the State courts are by the decree here called in question. In essence, under Article VI, Clause 2, of the Constitution, the question should be the same, in whichever court the suit might be brought. But we will frankly admit that we do not believe the Supreme Court of Pennsylvania was attempting to define the scope of the jurisdiction of the United States District Courts. No suit to enjoin the enforcement of an order of the Commission has ever been brought, so far as we can ascertain, in a Federal court; but if such a suit should be brought, we think it extremely improbable, not merely that the Federal court would feel bound to follow the State Supreme Court, but that the Federal court would regard the State court as having even intended to limit it in the exercise of its powers. We admit, therefore, that the Federal court was open to our client to redress the wrong deemed by it to be involved in the Commission's order. But that it could not be relegated by the State legislature to the Federal court, we have argued (and, we submit, correctly argued) in our original brief (pp. 158-166).

(1) UNDER THE PROVISIONS OF THE PENNSYLVANIA PUBLIC SERVICE COMPANY LAW THE RIGHT TO REVIEW THE ACTION OF THE COMMISSION WAS LIMITED IN THIS CASE TO AN APPEAL TO THE SUPERIOR COURT.

The Public Service Company Law is divided into six articles, whose several subject-matters are described as follows by the act itself:

I. Definitions.

II. Duties and Liabilities of Public Service Companies.

III. Creation, Powers, and Limitation of Powers, of Public Service Companies.

IV. Constitution of Commission.

V. Powers and Duties of Commission.

VI. Practice and Procedure before the Commission and upon Appeal.

The act is too long to reprint—we had almost said, too long to read. But we think it obvious from its general scheme that provisions relating to the method of contesting the validity of orders of the Commission are to be looked for in the sixth and last article of the act, and we have quoted for your Honors' consideration all

the provisions of that article which have any bearing upon the question (*supra,* pp. 4-36).

The question which has been proposed by this Court, as to the State practice under this State statute, is of course one to which the highest State court alone can give a conclusive answer. The Supreme Court of Pennsylvania has, we believe, given such an answer to this very question, and before arguing the why and wherefore of that answer we would submit for the consideration of this Court the pronouncements of the State court upon the matter.

The fullest outline of the practice under the Public Service Company Law in any of the cases is to be found in *St. Clair Borough vs. Tamaqua & Pottsville Elec. Ry. Co.,* 259 Pa., 462 (1918), where the Court said, by Moschzisker, J. (pp. 466-469):

> "The Act of 1913, *supra,* does not deprive the courts of any ultimate power theretofore vested in them under the laws of the Commonwealth; it requires merely that, when a rate is to be or has been increased by a public service corporation, all complaints concerning the change shall be first submitted to and passed upon by the Public Service Commission. In turn, the decision of the commission is subject to review, and the courts are vested with the right and fixed with the duty of passing upon the record brought up on *appeal* (Boro. of Mt. Union vs. Mt. Union W. Co., 256 Pa., 516,

518), 'which record shall include the testimony taken therein, the findings of fact, if any, of the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission' (Article VI, Section 18). In cases where the parties theretofore had a right of trial by jury, it is still preserved to them (Article VI, Section 29, as amended by the Act of June 3, 1915, P. L. 779, 782; New Brighton Boro. vs. New Brighton W. Co., 247 Pa., 232, 241; West Virginia P. & P. Co. vs. Public Service Commission, 61 Pa. Superior Ct., 555, 569); and in all instances it is made the duty of the reviewing court, if it shall find from the record 'that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, *or is otherwise not in conformity with law,*' to 'enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law' (Article VI, Section 24). The fact that no complaint is made to the commission, when a change of rate is filed with that body, does not prevent any person affected thereby from subsequently entering one (Article V, Section 4): Baltimore & Ohio R. R. Co. vs. Public Service Commission, 66 Pa. Superior Ct., 403, 406. The commission is armed with ample facilities for making investigations, and the provisions of the statute afford it full means of enforcing its orders when entered; moreover, in change-

of-rate cases, pending hearing, the commission is expressly empowered to require the public service company involved to 'furnish to its * * * patrons a certificate * * * of payments made by them in excess of the prior established rate' (Article V, Section 4), and subsequently, if an increase is denied, to make an order for reparation (Article V, Section 5).

"The plaintiff borough in the present case may file its complaint and have it passed upon by the Public Service Commission, whose duty will be, not only to decide as to the reasonableness of the rate, but also to find all material facts in connection with the increase: B. & O. R. R. Co. vs. Public Service Commission, supra, p. 413. Should the commission decide that the change of fare is unreasonable, then, so far as the borough is concerned, that will be the end of the matter; but, on the other hand, should that tribunal permit the increase, then, *on appeal,* the borough can raise all questions properly involved in which it has an interest, *and have them passed upon by the courts.*

"Since the Public Service Company Law has been upon our books, we have consistently adhered to the rule that matters within the jurisdiction of the commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (Bethlehem City Water Co. vs. Bethlehem Borough, No. 2, 253 Pa., 333, 337-8; New Brighton Borough vs. New Brighton Water Co. et al., 247 Pa., 232, 240, 241, 242); and

it is plain that orderly procedure requires an adherence to this practice, otherwise different phases of the same case might be pending before the commission and the courts at one time, which would cause endless confusion. Under the established system, the commission, in the first instance, passes upon all changes of rates made by public service corporations, *subject to a proper and well regulated review by the courts, where and when all questions of law may be raised and determined;* and 'this is so not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose. The disposition everywhere is to commit questions, relating to the regulation and to the rates of public service corporations, to the supervisory powers of special tribunals, and, concededly, matters of this character are within the domain of legislative action': Bellevue Borough vs. Ohio Valley Water Co., supra, p. 118; see also York Water Co. vs. York, 250 Pa., 115, 118." (Italics ours.)

It of course needs no argument to show that the "appeal" referred to in this opinion is the "appeal" referred to in the title of Article VI of the act (*supra*, p. 6) and elaborately described and limited by its provisions,—an appeal which lay originally to the Court of Common Pleas of Dauphin County (p. 6) and on appeal therefrom to the Supreme Court (p. 12), but under the amendments lies to the Superior

Court (p. 21) and on appeal therefrom to the Supreme Court (p. 34). The language of the statute is throughout the language of appeal, but the effect of it is to provide for original judicial jurisdiction, once in the Dauphin Common Pleas, now in the Superior Court, and appellate judicial jurisdiction in the Supreme Court. The procedure prescribed in the Court's opinion in the above case was followed in the case at bar. It will be observed that there is no alternative to the prescription. It is "on appeal" (and it would seem, only on appeal) that questions of law involved in an order of the Commission may be raised and determined. Bold, too bold, would be the patient who, suffering from such an order, should disregard the physician's mandate and seek another remedy, merely because another remedy than that prescribed is not expressly forbidden. *Expressio unius est exclusio alterius.*

But we are not left to inference, however plain, as to the construction given to the act by the State Supreme Court. That court, on the very day on which it handed down its opinion in the case at bar, unanimously decided the case of *Pittsburgh Rys. Co. vs. Pittsburgh,* 260 Pa., 424 (1918), Moschzisker, J., saying for the court with reference to the Public Service Act (p. 427):

> "Since the act just mentioned has become part of our statute law, in cases such as the one at bar, the courts have no jurisdiction to consider or adjudge the issues involved until they come to them *on appeal,* and even then their powers are restricted

by the limitations of the act and the established relevant rules governing the review of facts by appellate tribunals: New Brighton Boro. vs. New Brighton W. Co. & Beaver Valley W. Co., 247 Pa., 232, 240-2; *Ben Avon Boro. vs. Ohio Valley Water Co.*, 260 Pa., 289; St. Clair Boro. vs. Tamaqua & Pottsville Elec. Ry. Co., 259 Pa. 462." (Italics ours.)

Whether the power of the courts to pass upon the facts can be so restricted, under the Constitution of the United States, when the question is as to the entire return from all the property of the public servant, is the first and most important question upon this writ of error. But, however this question may be decided, it is as plain as if written in the opinion in the case at bar (which was not only handed down on the same day but is referred to as an authority for the proposition) that the courts of Pennsylvania have no jurisdiction save "on appeal" from the Public Service Commission and that the plaintiff in error here pursued the only remedy open to it under the State law.

The rule has again been laid down in *Klein-Logan Co. vs. Duquesne Light Co.*, 261 Pa., 526 (1918), where the court unanimously adopted the opinion of Wasson, J., in the court below, the Common Pleas of Allegheny County (p. 528):

"The Public Service Law of 1913 gives the Public Service Commission exclusive jurisdiction, in the first instance, to inquire into and regulate the service, rates, fares, tolls and charges of any

and all public service companies. The courts of Pennsylvania no longer have jurisdiction *except upon appeal* from a determination by the Public Service Commission." (Italics ours.)

It will be seen from the report of the case that this language was made the basis of the first assignment of error (designated by brackets) and so was in the very forefront of the case upon appeal to the Supreme Court.

The lower courts also and the entire profession have, we believe, invariably understood the act as permitting one method only of contesting the validity of such an order of the commission as that here involved.

For example, the Court of Common Pleas of Luzerne County said in *Citizen's Elec. Ill. Co. vs. Consumers Elec. Co.,* 17 Luzerne Legal Register, 413 (1915), per Strauss, J. (p. 415):

"It therefore seems to us to be certain that the purpose of the Legislature was to create a system of single and concentrated supervision in the Public Service Commission over actions taken by public service companies under their several charters and permits obtained from the Public Service Commission, subject to judicial control *only upon appeal* by the Court of Common Pleas of Dauphin County, and under Article VI., Section 30, of the Supreme Court.

"To open the doors of litigation on these orders of the Public Service Commission in every judicial district of the Commonwealth, might lead to end-

> less confusion in practice and might impose upon the Public Service Commission, whose duty it is to produce an effective administration of this new statute, such burden of defending decrees and determinations in the several courts of Common Pleas of the Commonwealth as might leave them but little time for the performance of the essential duties of their office. Because the jurisdiction over contests of this character seems to us to be vested in the Public Service Commission, the Court of Common Pleas of Dauphin County, and the Supreme Court of the State, we must refuse to award this injunction and suggest that the application be made by complaint in the tribunal specially established for this class of litigation." (Italics ours.)

So also the Court of Common Pleas of Allegheny County (in which are situated all the municipalities which are parties to this suit and all the property and business of the plaintiff in error) said in *Millvale Borough vs. Pittsburgh Rys. Co.*, 66 Pittsburgh Legal Journal, 148 (1918), by Shafer, P. J. (pp. 148, 150):

> "If the defendants in these cases were public service corporations of any kind other than street railways there would be no question that the whole matter of regulation of rates would belong to the Public Service Commission, *subject to appeal therefrom as provided by law;* and there would further seem to be no doubt that these conditions or contracts, whichever they may be, would be set aside by the Public Service Company Act of 1913.
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"A further reason why we are of opinion no injunction should be granted in these cases is a more cogent one, and that is that as we understand it, the Supreme Court in the case of the Borough of St. Clair vs. Tamaqua & Pottsville Railway Company, very recently decided, is of opinion that the matter of increase or change of rates is wholly for the Public Service Commission in the first instance, no matter what reasons the municipality may have for claiming that the commission cannot lawfully make the increase. In that case it appears to have been in dispute whether or not there was a condition in any ordinance binding upon the parties, such as those in the ordinances in these cases. It is stated in the opinion in that case that the matter should be brought before the Public Service Commission and that if the commission decides that the change of fare is unreasonable, so far as the borough is concerned, the matter will be at an end; but that, on the other hand, if that tribunal permits the increase, 'then on appeal the borough can raise all questions properly involved in which it has an interest and have them passed upon by the courts.' The reason for this is given in the statement that orderly procedure requires an adherence to the practice of requiring all matters within the jurisdiction of the commission to be first heard by it, for 'otherwise different phases of the same case might be pending before the commission and the courts at one time, which would cause endless confusion.' It is true that in this case the plaintiffs deny that the commission has any jurisdiction, but it must be admitted that, prima facie,

a case of change of rates is subject matter for determination by the commission in the first instance. The Act does not appear to provide, in terms, when the change of rate of fare shall take place, but the fair implication from the arrangement provided for, as to rebate slips, is that the change shall take place after the notice required and continue until after the matter is determined. This would seem to indicate that in any case which is properly begun before the commission the courts are without power to grant an injunction to require a different arrangement to be made."

No case can be found which militates in any way against the authoritative character of the repeated pronouncements of the Supreme Court of Pennsylvania. They are, moreover, only the most explicit examples of a large body of authority pointing in the same direction. We have quoted at length from all other opinions throwing light upon the procedure by which to contest the validity of an order of the commission in "Appendix A" of this brief (pp. 1a ff.).

With these cases, we submit, we could leave our answer to the question propounded by this Court. The Court will not be astute, in aid of a decision of a State court but to the destruction of the substantial constitutional rights of a litigant, to explain away the plain holding of that court: *Brooks-Scanlon Co. vs. Railroad Commission of Louisiana*, No. 386, October Term, 1919 (decided February 2, 1920). But we feel impelled, by the vital importance of this litigation to our client, and because of our ignorance of the course which the

argument of the learned counsel for the appellees may take, to proceed further and to argue the question as if it arose here *de novo*. In doing so we shall consider *seriatim* the remedies which might be suggested as a result of a casual reading of the act, saving to the last the one which was here resorted to and which the Supreme Court has repeatedly referred to as the only remedy under circumstances like those here involved.

(*a*) *Article VI, Section 31.*

This section will be found quoted above (p. 13). It is a part of the original act, not amended by the Acts of 1915 and 1917. Under the original act the Court of Common Pleas of Dauphin County was the court of first instance on appeal from the Commission. The object of the amendments of 1915 (supra, p. 19), as disclosed by the title of the act (in which, under Article III, Section 3, of the Constitution of Pennsylvania, the subject must be clearly expressed), was to substitute the Superior Court for the Dauphin Common Pleas for this purpose. The amending act was, however, aside from the title, a piece of journeyman's work. It amended specifically some of the pertinent sections of the original act by making the proper substitution of the Superior Court for its predecessor. It neglected to amend others. The Superior Court has held, as to two of the overlooked sections, that they are to be regarded as if amended in view of the title of the amending act: *West Virginia Pulp & Paper Co. vs. Public Service Commission*, 61 Pa. Superior Ct., 555 (1915)—*infra*, p. 14a. Whether it would hold similarly with regard to Article VI, Section 31, however, is problematical; and we shall assume,

arguendo, that it would not do so. The section is there, and we shall construe it literally, in spite of the admonition of the Superior Court as to the impropriety of such a construction in the case just referred to.

We have said that the section is there; and it may well be asked, where? It is in that article of the act entitled "Practice and Procedure before the Commission and upon Appeal" (supra, p. 6). It follows a large number of sections relating to the procedure upon appeal and specifying its conditions and limitations in great detail. Section 31 in itself, on the other hand, is meager. The extent of the remedies referred to therein is entirely vague and conjectural. The case is, therefore, we submit a proper one for the application of the rule *Noscitur a sociis.* It cannot be supposed that the elaborate procedural structure established by the context of this section was to be torn down or rendered vain or useless by it. If there be limitations in the context, they are, in the absence of an express repudiation here, applicable here also. In short, the carefully limited remedy by appeal provided by the legislature to protect the legal right of parties before the Commission, to which all the evidence must first be presented, is not to be rendered entirely unnecessary by a bare nondescript provision such as that contained in Section 31.

Having put the section, therefore, in its place, let us examine it to see what manner of remedy it provides. Its principal purpose would seem to be the negative (and yet constructive) one of denying jurisdiction to all other courts of first instance than the one to which

an appeal lay to contest the validity of an order of the commission. Another court, if it could act in such a matter, could act only by injunction. It is forbidden to do so by this section. The Dauphin Common Pleas could act under the provisions for an appeal. It may act under this section by injunction. *Under what circumstances, then, may a court act by injunction?* It is a remedy of equity. It is a remedy, to use the old phrase, of grace and not of right. If there be no other available or adequate remedy to enforce a right, it may be resorted to. But when the common law or a statute has already provided a remedy appropriate to the exigency, it must be followed, and the extraordinary remedy by injunction is not open. The rule is cogently stated by Mr. Justice Field delivering the opinion of this court in *Ewing vs. City of St. Louis*, 5 Wall., 413 (1866), at pp. 418-419:

> "With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by extrinsic evidence. In other cases the review and correction of the proceedings must be obtained by the writ of certiorari. This is the general and well-established doctrine."

Now there was in the case at bar an appropriate remedy,—by appeal to the Superior Court. There was,

therefore, no right to an injunction. The remedy by injunction is complementary, not substitutionary, to the remedy by appeal.

The history of the act strongly fortifies the construction which we have given to this section. It has been in force for six years and more, and perhaps no law upon the statute books of the state has given rise to more litigation. And yet a painstaking search indicates that never has it occurred to any litigant that he had a remedy under this section. The section has never even been mentioned in any opinion of the Supreme Court, the Superior Court, or the Court of Common Pleas of Dauphin County. It has been commented on in the opinions in two cases in other Common Pleas courts with reference to its *prohibitory* aspect: *Borough of Bellevue vs. Ohio Valley Water Co.*, 62 Pittsburgh Legal Journal 129, 131-132 (C. P. Allegheny County, 1914); *Leiper vs. Baltimore & Philadelphia R. R. Co.*, 26 Pa. District Reports, 358, 362 (C. P. No. 4, Philadelphia County, 1917). Each of these cases went to the Supreme Court on appeal, and that court, as we have already stated, said nothing about the section: *Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pa., 114 (1914); *Leiper vs. Baltimore & Philadelphia R. R. Co.*, 262 Pa., 328 (1918). No suit for an injunction against the enforcement of an *order* of the commission has been brought; and no suit for an injunction against the commission in a case not covered by Section 31 has been brought, so far as our research has informed us, except *Fisher vs. Public Service Commission*, 18 Dauphin

County Reports, 580 (1915). In that case a preliminary injunction was refused, and the case apparently was not proceeded with further.

Do we then make the section of no effect? By no means. "They also serve who only stand and wait;" and this section is upon the books ready to be availed of in a proper case. We shall not attempt to foresee all the proper cases for its application, but shall mention one or two situations where we think it would afford the only remedy.

It is not everyone affected by an order of the commission that can appeal therefrom to the Superior Court, but only a "party to the proceedings" (Article VI, Section 17, *supra*, p. 21. Now it needs no argument to show that others than parties to proceedings before the commission may be affected by orders of that body exercising its legislative powers. Such an order may be made, and no "party to the proceedings" may appeal. A person who deems himself prejudicially affected, but is not a party, has no method of compelling the Commission to hear him. He must obtain its permission to intervene (Article VI, Section 14),* and if that is granted it may be on terms that do not prevent the immediate enforcement of the order (Article VI, Section 15).* How can he protect his

*Section 14. After any finding, determination, or order shall have been made by the commission, any public service company or municipal corporation affected thereby, or any party complainant in the proceedings, or any person, corporation, or public service company, or association duly permitted by the commission, on proper petition and cause shown, to intervene, may apply,

legal rights? By (and only by) a suit for an injunction under Article VI, Section 31. The remedy by appeal open to a party is not open to him if he is not permitted to intervene. The remedy by appeal open to him after rehearing if he is permitted to intervene is not adequate if the allowance of a rehearing does not operate as a supersedeas. But it is otherwise in a case, such as the one at bar, where the person aggrieved by the order was a party to the proceedings *ab initio*, entitled to an appeal which the court must (and did) on the filing of a bond make a supersedeas without any permission from the legislative body (Article VI, Section 19, *supra*, p. 9).

The Commission is the delegate of many legislative powers. The fifth article of the act has twenty-nine sections full of them. But it is confined none the less to the field of public service. Article I, Section 1, of the act provides (*inter alia*):

> "That none of the provisions of this act shall apply to the generation, transmission, or distribution of electricity; to the manufacture or distribution of gas; to the furnishing or distribution of

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within fifteen days after the service of said order, for a rehearing in respect to any matter determined by the commission in or by its hearing or investigation and order issued therein; and the commission may grant and hold such rehearing, if in its judgment sufficient cause therefor be shown. All applications for rehearing shall be by petition, specifically setting forth the grounds upon which such application is based.

Section 15. No application for a rehearing shall in anywise operate as a supersedeas, or in any manner stay or postpone the enforcement of the original or existing order, except as the commission may by its order direct.

water; or to the production, delivery, or furnishing of steam, or any other substance for heat or power, by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for sale to others."

Suppose a person coming within the class mentioned in this provision is erroneously ordered by the Commission to exhibit to its employees his accounts, records, and memoranda.* He does not wish to comply with the order; he is not bound by law to comply with the order; but the evidence of his immunity from the order does not appear in the record of the Commission which alone can be considered on appeal (Article VI, Sections 23 and 25, *supra,* pp. 10, 11). Appeal in such a case is an inadequate, fruitless remedy, and he may resort to an injunction under Section 31. But that is a very different case from the one at bar, where the rates of the plaintiff in error were fixed by the Commission after hearing testimony and making a record as well as an order, an appeal from which would operate as a supersedeas upon the filing of a proper bond.

*Article V, Section 15. * * * The commission shall at all times have access to all accounts, records, and memoranda kept by public service companies; and may designate any of its officers or employees, who shall thereupon have authority to inspect and examine any and all accounts, records, and memoranda kept by such public service companies. * * * *

We might multiply instances. But it is unnecessary. Enough has been said to show that Section 31 of Article VI has a place in the scheme of things contemplated by the legislature, but no place in the case at bar.

(*b*) *Article V, Section 29.*

This section reads as follows:

> "Except as herein otherwise expressly provided, none of the powers or duties conferred or imposed by this act upon the commission, and none of the orders, regulations, rules, or certificates made or issued by the commission, and none of the duties, powers, or limitations of the powers, conferred or imposed by this act upon public service companies, or the performance or exercise thereof, shall be construed in anywise to abridge or impair any of the obligations, duties, or liabilities of any public service company in equity or under the existing common or statutory law of the Commonwealth; but all such obligations, duties, and liabilities shall be and remain as heretofore. And, except as herein otherwise provided, nothing in this act contained shall in any way abridge or alter the existing rights of action or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this act shall be cumulative, and in addition to such rights of action and remedies."

This is the last section of Article V of the act, the title of which is "Powers and Duties of the Commis-

sion." It has no relation whatever to the question how the validity of an order of the Commission may be contested. That question is dealt with in Article VI of the act in provisions already quoted at length. This section is merely a saving clause. It creates no remedy. Before the passage of this act, there was no Public Service Commission, and no remedy, therefore, that might be interposed against its orders. Since the passage of the act there is no remedy save that provided by the act or by the common law in view of the act. As to whether there can be a remedy independent of the act, we shall have something to say later (*infra*, pp. 61 ff.). That the act itself provides no remedies against an order of the Commission other than the remedy under Article VI, Section 31, and the remedy by appeal to the Superior Court is our confident conclusion based on a careful study of its provisions.

Article V, Section 29, has been referred to by the courts in a number of cases: *Bethlehem City Water Co. vs. Bethlehem Borough* (*No. 2*), 253 Pa., 333 (1916), per Moschzisker, J., at p. 337, affirming *Id. vs. Id.*, 42 Pa. County Court Reports, 204 (C. P. Northampton County, 1914), per Stewart, J., at p. 206; *Pittsburgh Rys. Co. vs. Pittsburgh*, 260 Pa., 424 (1918), per Moschzisker, J., at p. 427; *Leiper vs. Baltimore & Philadelphia R. R. Co.*, 26 Pa. District Reports, 358 (C. P. No. 4, Philadelphia County, 1917), per Finletter, J., at p. 362, affirmed without mention of this section in *Id. vs. Id.*, 262 Pa., 328 (1918); *Sunbury Boro. vs. Northumberland County Gas & Electric Co.*, 27 Pa. District Reports, 294 (C. P. Northumberland County), per Moser, J., at p. 295; *Baltimore & Harrisburg R. R.*

Co. vs. Hanover & McSherrytown St. Ry. Co., 31 York Legal Record, 145 (C. P. York County, 1918). All these cases show that the section means no more than it says: the question in each of them was whether previously "existing remedies in equity or under the common or statutory law" to enforce "the obligations, duties, and liabilities of any public service company" were abridged or altered by the act. The previously existing remedy to prevent unreasonable charges by a water company was by bill or petition in a Court of Common Pleas (Act of April 29, 1874, Section 34, Clause 7, last proviso, P. L. 95*). It was expressly abolished by Article VI, Section 51, of the Public Service Company Law (*supra*, p. 17). So it is plain law, and was so held in *Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pa., 114 (1914) (*infra*, p. 1a), that the boroughs in this case had no remedy save by complaint to the Commission; and it is equally plain law, and for a like reason, that the plaintiff in error had no remedy save by appeal from the Commission.

(c) *Article VI, Section 42.*

This section reads as follows:

> "All suits, remedies, prosecutions, penalties, and forfeitures provided for or accruing under this act shall be cumulative."

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*And provided further, That the court of common pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process.

It has not been noticed expressly by any court in Pennsylvania. One man's guess about it is perhaps as good as another's, and it is our guess (though it is found in the midst of provisions relating to penalties, forfeitures, and fines) that it cumulates remedies against, as well as remedies in favor of, the commission's action. But what does it cumulate? No remedies but those "provided for or accruing under this act." And all such remedies, other than that by appeal from the order of the Commission, we have shown to be inapplicable to the case at bar. The Supreme Court of Pennsylvania has doubtless seen this section, even though it has not spoken about it; but if the section were now for the first time presented to that tribunal, it is inconceivable that it would permit its provisions to disturb the "orderly procedure" by hearing before the Commission, subject to a proper and well-regulated review by the courts "on appeal"; *St. Clair Borough vs. Tamaqua & Pottsville Elec. Ry. Co.*, 259 Pa., 462, 468 (1918), (*supra*, p. 39). The court which has said that such an appeal is the only applicable remedy will not be deterred from its settled construction of the act by the fact that remedies inapplicable here are cumulative to this remedy in a proper case.

(*d*) *Article VI, Sections 17-30, 32-36, 39.*

These sections (*supra*, pp. 6 ff.) relate, directly or indirectly, to the matter of appeals from orders of the Commission, being the second of the two principal divisions of the subject-matter of Article VI of the act, as expressed in its title, "Practice and Procedure before the Commission and upon Appeal." The remedy prescribed by them was resorted to in the case at bar by the plaintiff in error.

When we explore this remedy, we do not sail an uncharted sea. We know that the Superior Court, on appeal from the Commission, is a court acting judicially. See, among many other authorities, the cases cited at page 65 of our original brief, to which may be added *Pennsylvania R. R. Co. vs. Public Service Commission of the Commonwealth of Pennsylvania*, 250 U. S., 566 (1919), in which this court entertained a writ of error to the Superior Court. We know that it is a proper tribunal for the determination of a case (*inter alia*) involving "the construction or application of the Constitution of the United States," in which, by express provision of the amendment of 1917, as in like cases not under this statute, an appeal lies from it of right to the Supreme Court of Pennsylvania (Article VI, Section 30, *supra*, p. 34). We know that it has in many cases, in addition to the one at bar, specifically passed upon questions arising under the Constitution. See, *e. g., Relief Electric Light, Heat and Power Company's Petition*, 63 Pa. Superior Ct., 1, 9 (1916) (*infra*, p. 16a); *Jenkins Township vs. Public Service Commission*, 65 Pa. Superior Ct., 122, 137 (1916) (p. 19a); *V. & S. Bottle Co. vs. Public Service Commission*, 70 Pa. Superior Ct., 308, 311 (1918) (p. 24a); *Foltz vs. Public Service Commission*, 73 Pa. Superior Ct., 24, 34-35 (1919) (p. 32a). We know that the State Supreme Court has said, in cases of a like character to the one at bar, that the only remedy against an order of the Commission is by appeal to the Superior Court (*supra*, pp. 39-45). *We know that no other remedy against such an order than that by appeal has ever been sought in any court. And we know that at least eighty-three appeals contesting the validity of*

orders of the commission have been disposed of by the courts—two by the Dauphin Common Pleas prior to the passage of the amendments of 1915, and eighty-one by the Superior Court since their passage. (References to the reports of these eighty-three cases will be found in "Appendix B," *infra*, p. 39a.) If there could be a doubt as to the correctness of the pronouncements of the Supreme Court of Pennsylvania above referred to, we submit that it must be dispelled by the concurring practical construction given to the act consistently for more than six years crowded with litigation.

We submit, therefore, that under the provisions of the Pennsylvania Public Service Company Law the right to review the action of the Commission was limited in this case to the particular remedy which was resorted to by the plaintiff in error.

(2) NO OTHER REMEDY THAN THAT GRANTED BY THE PUBLIC SERVICE COMPANY LAW WAS OPEN TO THE PLAINTIFF IN ERROR IN THE COURTS OF PENNSYLVANIA.

We presume that this proposition will not be disputed. Unless the Public Service Company Law grants a remedy, there is none. It has been iterated and reiterated in the opinions of the Pennsylvania courts that this statute affords a complete system of remedies, and that the procedure laid down therein must be followed to the exclusion of any possible alternatives It is unnecessary to quote from the cases. Among them may be mentioned *Bellevue Borough vs. Ohio Valley Water Co.*, 245 Pa., 114 (1914), (*infra*, p. 1a), affirming *Id. vs. Id.*, 62 Pittsburgh Legal Journal, 129 (C P Allegheny

County, 1914) (*ibid.*); *New Brighton Borough vs. New Brighton Water Co.*, 247 Pa., 232 (1915), (p. 2a); *York Water Co. vs. York*, 250 Pa., 115 (1915), (p. 3a), affirming *Id. vs. Id.*, 28 York Legal Record, 193 (C. P. York County, 1915), (p. 4a); *St. Clair Borough vs. Tamaqua & Pottsville Elec. Ry. Co.*, 259 Pa., 462 (1918), (*supra*, p. 39); *Pittsburgh Rys. Co. vs. Pittsburgh*, 260 Pa., 424 (1918), (p. 43); *Klein-Logan Co. vs. Duquesne Light Co.*, 261 Pa., 526 (1918), (p 44); *Leiper vs. Baltimore & Philadelphia R. R. Co.*, 262 Pa., 328 (1918), (*infra*, p. 11a); *Rochester Building & Loan Assn. vs. Beaver Valley Water Co.*, 68 Pa. Superior Ct., 122 (1917), (p. 22a); *Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Superior Ct., 446 (1918), p. 25a); *Citizen's Elec. Ill. Co. vs. Consumers Elec. Co.*, 17 Luzerne Legal Register, 413 (C. P. Luzerne County, 1915), (*supra*, p. 45); *Millvale Borough vs. Pittsburgh Rys. Co.*, 66 Pittsburgh Legal Journal, 148 (C. P. Allegheny County), (p. 46).

It should be pointed out that these decisions are not mere instances of statutory construction. Under the positive law of Pennsylvania the courts were not at liberty to come to any other conclusion.

Section 13 of the Act of March 21, 1806, "to regulate Arbitrations and Proceedings in Courts of Justice," 4 Sm. L. 326 (1 Purdon's Digest, 13th ed., 271), reads as follows:

> "That in all cases where a remedy is provided or duty enjoined, or any thing directed to be done by any act or acts of Assembly of this commonwealth, the directions of the said acts, shall be

strictly pursued, and no penalty shall be inflicted or any thing done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect."

This statutory provision is an integral part of the law of Pennsylvania. It has been referred to in scores of cases; it has been applied *sub silentio* in hundreds of cases. We could not cite them all save in a monograph; but we have collected in chronological order in "Appendix C" (p. 45a) a sufficient number of those decided by the Supreme and Superior Courts to illustrate the course of decision under the statute. It has been given a very wide application. Previously existing legal and equitable remedies are held, under this statute, to be abrogated whenever a statutory remedy is created covering the field occupied by them. The statute has a special application in cases where an attempt has been made in spite of the existence of a statutory remedy to resort to a bill in equity. Equity is a part of the common law of Pennsylvania, administered so far as possible under common law forms. Equitable procedure (unless perhaps sporadically before the Revolution) was not available in Pennsylvania until the Act of June 16, 1836, P. L. 784, Section 13 (2 Purdon's Digest, 13th ed., 1405);* and then only within a comparatively

*The Supreme court, and the several courts of Common Pleas shall have the jurisdiction and powers of a court of Chancery, so far as relates to:

I. The perpetuation of testimony:

II. The obtaining of evidence from places not within the state:

III. The care of the persons and estates of those who are non compos mentis:

narrow field, wider in Philadelphia County than elsewhere. By the Act of February 14, 1857, P. L. 39 (Id.,

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IV. The control, removal and discharge of trustees and the appointment of trustees, and the settlement of their accounts:

V. The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations, and partnerships:

VI. The care of trust monies and property, and other monies and property made liable to the control of the said courts.

And in such other cases, as the said courts have heretofore possessed such jurisdiction and powers, under the constitution and laws of this commonwealth.

And in every case in which any court as aforesaid, shall exercise any of the powers of a Court of Chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the Supreme court of the United States, unless it be otherwise provided by act of assembly, or the same shall be altered by the Supreme court of this Commonwealth by general rules and regulations, made and published as is hereinbefore provided; and the Supreme court when sitting in banc, in the city of Philadelphia, and the court of Common Pleas for the said city and county, shall, besides the powers and jurisdiction aforesaid, have the power and jurisdiction of courts of Chancery, so far as relates to—

I. The supervision and control of partnerships, and corporations other than municipal corporations.

II. The care of trust monies and property, and other monies and property made liable to the control of the said courts.

III. The discovery of facts material to a just determination of issues, and other questions arising or depending in the said courts.

IV. The determination of rights to property or money claimed by two or more persons, in the hands or possession of a person claiming no right of property therein.

V. The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals.

VI. The affording specific relief, when a recovery in damages would be an inadequate remedy: Provided, That in relation to the discovery of facts material to a just determination of issues, and other questions, the District court for the city and county of Philadelphia, shall have the same power and authority, within its jurisdiction, as is hereby conferred on the court of Common Pleas for the said city and county: And provided further, That no process to be issued by the said courts of the city and county of Philadelphia, or the Supreme court, sitting therein, under the chancery powers herein specially granted, except such as have heretofore been exercised, shall at any time be executed beyond the limits of the city and county aforesaid.

p. 1412),* the jurisdiction of the Philadelphia Common Pleas was extended throughout the State; and from time to time the jurisdiction has been augmented. But it is still confined to the matters specified in the statutes; and so throughout the history of our courts it has been more sparingly resorted to than in most jurisdictions.

In *Brown's Appeal,* 66 Pa., 155 (1870), the Supreme Court said, by Thompson, C. J., in a case involving the Landlord and Tenant Act of 1863 (p. 157):

> "The court had no jurisdiction in equity of the proceedings. They were not contrary to law; and if they had been, *an injunction was not a correctional process. That was to be done by the process provided in the act, viz., by appeal or certiorari.* These were the legal matters provided in the act, *and a court of equity could not supplement them.* Courts may restrain acts contrary to law, but not where they are according to positive law. That would be to put the courts above the legislature. *Where a positive statutory remedy exists and may be pursued, equity cannot interfere on the ground of irreparable mischief."* (Italics ours.)

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*That the courts of common pleas of the several counties of this commonwealth, in addition to the powers and jurisdictions heretofore possessed and exercised, shall have the same chancery powers and jurisdictions which are now by law vested in the court of common pleas or district court of the city and county of Philadelphia, and in all cases an appeal may be taken to the supreme court from the final decrees of the said courts respectively, in suits and proceedings in equity, in the same manner and on the same terms and conditions as are provided in cases of appeal from the decrees of the court of common pleas or district court of the city and county of Philadelphia.

In *Bailey vs Fitzpatrick,* 8 Philadelphia, 93 (Supreme Court at Nisi Prius, 1871), Sharswood, J., said:

> "I think it is unquestionable than when an act of assembly confers a special jurisdiction on any particular tribunal in regard to any class of cases, a Court of Equity ought not and will not assume jurisdiction. The most that it will do is to remove any obstructions which may inequitably be interposed against the party's bringing his cause to issue before the appropriate tribunal, intrusted by the legislature with its exclusive determination."

In *Appeal of Brotzman,* 119 Pa., 645 (1888), the court said by Paxson, J. (p. 656):

> "The 59th section of the Act of 1834 gives a complete remedy in the Orphans' Court, and was evidently intended to exclude every other remedy and jurisdiction. That this is so as to common law remedies is admitted. Such result necessarily follows from the Act of March 21, 1806, 4 Sm. L. 332, which provides that 'in all cases where a a remedy is provided, or duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of said act shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act or acts into effect.' The learned judge below, however, held that this did not interfere with the jurisdic-

tion of equity, and that a bill may still be filed in the Common Pleas to enforce the payment of a legacy charged upon land.

"This is a narrow view of the Act of 1806. Of what possible use is a bill in equity where an act of assembly has given a convenient and adequate remedy? *The very corner-stone of equity jurisdiction is that a wrong exists for which no adequate remedy has been provided, and which the law fails to correct by reason of its universality. Our books are full of cases in which it has been held that where a remedy has been provided by act of assembly, equity has no jurisdiction.* Thus it has been held that a bill in equity will not lie against an incorporated company where the act incorporating such company gives a remedy by a proceeding for the assessment of damages, and that such remedy must be pursued: Stump's Appeal, 38 Leg. Int., 205. We have innumerable decisions to the effect that in all such cases the remedy must be pursued. So, indeed, we have an act of assembly to that effect, the Act of 1806: Spangler's Appeal, 64 Pa., 387. *Other illustrations might be given and other authorities might be cited, were it necessary to show that under the Act of 1806 a remedy given by an act of assembly must be 'strictly pursued.'*" (Italics ours.)

In *Wilkes Rolling Mill Co. vs. Erie R. R. Co.*, 26 Pa. District Reports, 679 (C. P. Mercer County, 1916), a case under the Public Service Company Law, the court said by McLaughry, J. (p. 682):

> "An injunction should not be granted if the remedy provided by statute is an adequate one. *It has been held that where the complainant has an adequate means of redress before some private, quasi-judicial tribunal he is not entitled to an injunction.*" (Italics ours.)

This court, speaking by Mr. Justice Hughes, in *Louisville & Nashville R. R. Co. vs. Garrett,* 231 U. S., 298 (1913), held the Kentucky statute there involved constitutional because it "does not deny to the carrier the right of access to the courts for the purpose of determining any matter which would be the appropriate subject of judicial inquiry" (p. 311). We submit that in the case at bar the situation is entirely different. Under the Pennsylvania Act of 1806, *supra,* access to the courts is denied except in the manner prescribed by the Public Service Company Law; and that act prescribes the remedy here resorted to, which we have shown to be exclusive in this case, under the decisions of the Supreme Court of Pennsylvania.

We submit, therefore, that the right to review the action of the Commission was limited by the State statutes to the particular remedy which was here resorted to, and that the statutes did not leave open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the commission.

III.

Even if the Pennsylvania Law Left Open the Right to Invoke Judicial Power by Way of Independent Suit for the Purpose of Redressing Wrongs Deemed to have Resulted from Action Taken by the Commission, Nevertheless the Plaintiff in Error has been Deprived of its Liberty and Property without Due Process of Law.

We have answered directly the question propounded by this Court in the order for re-argument (*supra*, p. 1). We have succeeded, we believe, in showing that the Supreme Court of Pennsylvania and the other Pennsylvania courts which have passed upon the question have answered it precisely as we have answered it. With that we might have rested; but we undertook, as a work of supererogation, to justify the answer of the Pennsylvania courts to this Court. In this, too, we submit, we have succeeded. But if we had failed both upon authority and upon reason to sustain our answer to the question propounded by the Court, and the contrary answer should be given thereto, we submit, with deference, that the plaintiff in error would nevertheless be entitled to a reversal of the decree of the Supreme Court of Pennsylvania. The principle upon which such a reversal is called for is wider than the considerations involved in the number of possible remedies open to the party aggrieved by an order of the Commission.

In submitting this part of our argument to the Court, we wish first of all to point out as an indisputable proposition that the Superior Court and the Supreme Court of Pennsylvania in this case, unlike the Supreme Court of Appeals of Virginia under the statute involved in *Prentis vs. Atlantic Coast Line Co.*, 211 U. S., 210 (1908), were courts acting judicially: *Pennsylvania R. R. Co. vs. Public Service Commission of the Commonwealth of Pennsylvania*, 250 U. S., 566 (1919); and *cf. Bacon vs. Rutland R. R. Co.*, 232 U. S., 134 (1914), per Mr. Justice Holmes at p. 138; *Detroit and Mackinac Ry. Co. vs. Michigan R. R. Commission*, 235 U. S., 402 (1914), per Mr. Justice Holmes at pp. 404-406; *Wilmington City Ry. Co. vs. Taylor*, 198 Fed. Rep., 159 (D. C., Delaware, 1912), per Bradford, District Judge, at pp. 191-192; *Manufacturers' Light & Heat Co. vs. Ott*, 215 Fed. Rep., 940 (D. C., N. D. West Virginia, 1914), per Woods, Circuit Judge, at pp. 943-944. The Superior Court is referred to in this connection as a court in all the opinions of the Supreme Court relating to its jurisdiction: *Borough of Mount Union vs. Mount Union Water Co.*, 256 Pa., 516 (1917), *infra*, p. 7a; *St. Clair Borough vs. Tamaqua & Pottsville Electric Ry. Co.*, 259 Pa., 462 (1918), *supra*, p. 39; *Ben Avon Boro. vs. Ohio Valley Water Co. (No. 1)*, 260 Pa., 289 (1918), the case at bar, *infra*, p. 9a; *Pittsburgh Rys. Co. vs. Pittsburgh*, 260 Pa., 424 (1918), *supra*, p. 43; *Klein-Logan Co. vs. Duquesne Light Co.*, 261 Pa., 526 (1918), *supra*, p. 44; *Leiper vs. Baltimore & Philadelphia R. R. Co.*, 262 Pa., 328 (1918), *infra*, p. 11a. It has disclaimed any power, and the Supreme Court has said it has no power, to act as "a second administrative commission": *Borough of Mount Union vs. Mount*

Union Water Co.; Ben Avon Boro. vs. Ohio Valley Water Co.; West Virginia Pulp & Paper Co. vs. Public Service Commission, 65 Pa. Superior Ct., 5 (1916), *infra*, p. 18a; *Baltimore & Ohio R. R. Co. vs. Public Service Commission*, 66 Pa. Superior Ct., 403 (1917), p. 20a; *Pennsylvania R. R. Co. vs. Public Service Commission*, 67 Pa. Superior Ct., 575 (1917), p. 21a; *Rochester Building & Loan Assn. vs. Beaver Valley Water Co.*, 68 Pa. Superior Ct., 122 (1917), p. 22a; *V. & S. Bottle Co. vs. Public Service Commission*, 70 Pa. Superior Ct., 308 (1918), p. 24a; *Beaver Valley Water Co. vs. Public Service Commission*, 71 Pa. Superior Ct., 43 (1918), p. 26a; *Schuylkill Ry. Co. vs. Public Service Commission*, 71 Pa. Superior Ct., 204 (1919), p. 31a; *Harmony Electric Co. vs. Public Service Commission*, 71 Pa. Superior Ct., 355 (1919), p. 32a; *Henderson Coal Co. vs. Public Service Commission*, 73 Pa. Superior Ct., 45 (1919), p. 34a.

In the next place, we submit that it is proved in this case that the order of the Public Service Commission was a legislative act (our principal brief, pp. 67-84; reply brief, pp. 21-24); that the question as to confiscation of the property of the plaintiff in error is, under the Fourteenth Amendment, a judicial question (principal brief, pp. 84-114); and that the Public Service Company Law, as construed by the Pennsylvania Supreme Court, requiring the order of the Commission to be sustained if there was any substantial evidence to support it, deprived the plaintiff in error of a judicial review of the Commission's action, since the mandate to hear both sides "lies at the very founda-

tion of all regulated and intelligent judicial inquiry:" Shaw, C. J., in *Shaw vs. Stone*, 1 Cushing, 228, 243 (1848) (principal brief, pp. 115-158).

The question which we shall now discuss is whether, assuming the above to be true and to be sufficient in itself to require a reversal of the decree in this case, the existence of another remedy than the one which was here resorted to by the plaintiff in error would turn the tide against it. Is it to be told that it should have presented its claim of confiscation to another court than the Superior Court? We have already argued that the existence of a remedy in the *Federal* courts is immaterial to the question here involved (principal brief, pp. 158-166). We shall confine ourselves, therefore, to the question of the effect of a hypothetical additional remedy in the *State* courts. The question is a practical one; and to discuss it concretely we shall suppose for example that the alternative remedy is by bill in equity for an injunction in the Court of Common Pleas of Dauphin County under Article VI, Section 31, of the Act (*supra*, p. 13). We select this only as seeming to us the most plausible of the possible suggestions of an additional remedy to that by appeal. The arguments which we shall advance regarding it may be applied, *mutatis mutandis*, with like force to any possible additional remedy.

The situation after the making of the Commission's order on rehearing was as follows: The total property of the plaintiff in error had been valued at approximately $925,000, and its revenue had been confined to

a fixed return on this valuation. The only commissioner who had heard the testimony had dissented from the order of the Commission, declaring the valuation to be much too low. The value claimed by the plaintiff in error was $1,500,000. It was advised that the order of the Commission violated the Fourteenth Amendment to the Constitution of the United States. How could it set up its claim to the protection of the fundamental law?

It is now said, Why should it not have brought a bill in equity for an injunction in the Dauphin Common Pleas? But it may be replied with greater force, Why *should* it have done so? It chose the judicial remedy prescribed in great detail in Sections 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of Article VI of the act. Shall it be held bound to disregard these sections and place all its hopes on Section 31? It chose the remedy by which the legislature contemplated that Federal constitutional questions would be raised (Section 30, *supra,* p. 34). Was it to presume to be wiser than the law, and choose another remedy, merely because the Federal Constitution should protect it, whatever its choice? And if so, how can it be denied that protection now? It chose the only remedy which had been employed before or has been employed since to contest the validity of an order of the Commission. Is that remedy, above all others, to be held of no avail to secure it a judicial review of the legislative body's finding as to the value of all its property?

Suppose the plaintiff in error could have chosen and had chosen the other remedy. Is there any reason to conclude that it would have fared better? None

whatever. One may search the opinion of the Supreme Court in the case at bar in vain for any suggestion that the Superior Court is limited more narrowly by the act than the Supreme Court or any other court (Record, vol. 1, pp. 111 ff.). It is *"the courts"*—not any particular court—whose "powers are restricted by the limitations of the act and the established relevant rules governing the review of facts by appellate tribunals," to quote the language of Moschzisker, J., in the case (decided the same day as the one at bar) of *Pittsburgh Rys. Co. vs. Pittsburgh*, 260 Pa., 424, 427 (1918). The Supreme Court denies to itself and all other Pennsylvania tribunals the right of weighing testimony to see whether the Commission's scales are just. The question of power is not between one court and another, but between the courts and the legislative body.

But let us put the case against our contention at the highest possible point: let us assume that the limitation upon the judicial power, which the Supreme Court of Pennsylvania regards the act as imposing, concerns the remedy by appeal alone and not that by bill in equity nor any other possible remedy, the latter being entirely free from such a limitation. We submit that even on this hypothesis the plaintiff in error has been deprived of its liberty and property without due process of law. The right to a judicial review of the facts, an impartial consideration of the testimony on both sides, is given to it not by State law but by the Federal Constitution. Only the power that gave that right can take it away. The State legislature may specify the court to which it may go for its judicial review, but cannot limit the scope of the review. The Constitution itself says (Article VI, Clause 2):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is not the Judges named by the legislature who are so bound, not the Judges of the Dauphin Common Pleas alone nor of other courts not limited by legislative act, but every Judge in any court of the State which may be called on under the statutory practice to determine whether an order of the legislative body is "in conformity with law" (Article VI, Section 22, of the act, *supra*, p. 10). A litigant may rely upon his right under the Constitution in any court open to him, and the court must disregard any limitation attempted to be imposed upon that right. We may say of the plaintiff in error what this court said of the railroad companies in *Prentis vs. Atlantic Coast Line Co.*, 211 U. S., 210, 228 (1908):

> "But the determination as to their rights turns almost wholly *upon the facts to be found.* Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. *All their constitutional rights,* we repeat, depend upon what the facts are found to be. *They*

are not to be forbidden to try those facts before a court of their own choosing if otherwise competent." (Italics ours.)

Conclusion.

The question propounded by the Court is one of technical procedure, and we have discussed it technically. The question as to the necessity of answering the Court's inquiry in order to dispose of this case (we speak with deference) is one of constitutional distribution of authority upon a Federal matter, and its discussion has been necessarily to a certain extent abstract. We may be pardoned, therefore, in closing, if we remind the Court that this case is not an academic one. The Superior Court, acting judicially, found the value of the property of the plaintiff in error to be about $400,000 (over 43%) greater than the Commission found it to be. The Supreme Court did not dissent from this finding, but denied the existence of a power of judicial review in the face of a dispute in the testimony presented to the Commission. That the Commission's valuation was grossly confiscatory will be apparent, we believe, to this Court or to any other court exercising an independent judgment (see our principal brief, pp. 209-280). For six years the plaintiff in error has fought for its life and its possessions before the Commission and the courts against what it deems to be misguided official action. It has survived till now only by reason of a supersedeas of the Commission's order. After it appealed to the Superior Court and obtained a reversal of that order (subsequently re-instated by the Supreme Court), the matter became *res judicata,* and it

could not sue elsewhere, even in a Federal court: *Detroit and Mackinac Ry. Co. vs. Michigan R. R. Commission,* 235 U. S., 402 (1914); *Napa Valley Electric Co. vs. Board of Railroad Commissioners,* No. 401 October Term, 1919, decided January 19, 1920; *Gordinier's Appeal,* 89 Pa., 528 (1879); *Frauenthal's Appeal,* 100 Pa., 290 (1882); *Haneman vs. Pile,* 161 Pa., 599 (1894). Its case is now before your Honors, and its sole hope against impending calamity lies in the remedial constitutional action of this Court. To this Court we earnestly urge that both the intrinsic justice of its cause and the technical correctness of its contentions require that the decree of the Supreme Court of Pennsylvania be reversed. Such a reversal is, we believe, essential to save our client from financial ruin and to prevent a State legislative body from being in practically every case the supreme arbiter of a Federal constitutional right.

Respectfully submitted,

GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JOHN G. BUCHANAN,
Attorneys for Plaintiff in Error.

APPENDIX A.

Additional Cases on Practice under Public Service Company Law.

Bellevue Borough vs. Ohio Valley Water Co., 245 Pa., 114 (1914), per Elkin J., at p. 116:

"If the case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the section of the Act of April 29, 1874, P. L. 73, which gave courts the power to determine questions of this character was repealed by the Public Service Company Law, approved July 26, 1913, P. L. 1374. In other words, the legislature took this power away from the courts and conferred it upon the Public Service Commission. Hereafter, so long as the Act of 1913 remains in force, the question of the reasonableness of rates established by public service corporations, must in the first instance be submitted to the Public Service Commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well. We do not know that this position is seriously controverted by learned counsel for either side of the present controversy."

Same case in lower court, 62 Pittsburgh Legal Journal, 129 (C. P. Allegheny County, 1914), per Evans, J., at p. 133:

"The Legislature of Pennsylvania, by the Act of July 26, 1913, established a full, complete and adequate system for the determination of all questions affecting the relations between public service companies and their patrons and for the carrying out of the provisions of that act it established a tribunal for the determination of all questions arising under the act. This, in my judgment, ousts the jurisdiction of the court of equity to determine the questions raised by this bill. There is a complete and adequate remedy established by the legislature to determine the rights of the plaintiffs and the defendants in this controversy. That being true, equity has no jurisdiction. I might have determined this question solely on this last proposition, but I have discussed some of the provisions of the Public Service Act, not for the purpose of giving any decisive judgment as to the interpretation of that act, because that is for the Commission to determine, but for the purpose of illustrating how completely the legislature has covered every matter of controversy between public service companies and their patrons, and what extensive powers are possessed by the tribunal created by the legislature to pass upon questions of dispute in such cases."

New Brighton Borough vs. New Brighton Water Co., 247 Pa., 232 (1915), per Moschzisker, J., at pp. 241-242:

"On the whole, this act furnishes a complete and what should prove a satisfactory system in cases of this character, and thereunder all the relevant facts in possession of the New Brighton Company or the Beaver

Valley Company can be brought out and fully developed, and the rights of all parties conserved; therefore, since the approval of the commission must be first 'had and obtained' before the present plant can be actually acquired or operated by the borough, application should be made to that body before any future proceedings, mandamus or otherwise are instituted in the courts."

York Water Co. vs. York, 250 Pa., 115 (1915), per Elkin, J., at pp. 118-119:

"The Public Service Company Law was intended to provide a complete system for the supervision and regulation of public service corporations, and the intention of the legislature to repeal or supply all former acts inconsistent therewith is clearly expressed in the language of the statute. The purpose of the ordinances in question here was to prevent what was declared to be the exaction of unjust and exorbitant charges from a certain class of consumers, but this is a subject clearly within the powers of the Public Service Commission, and hence we are confronted with the situation that both bodies are vested with the same powers or that one must give way to the other. There should be no difficulty in deciding which horn of the dilemma the legislature intended to be taken. There can be no reasonable doubt that the legislative intention was to make the Public Service Act the supreme law of the State in the regulation and supervision of public service corporations, and this being so, it follows as a necessary sequence that all laws inconsistent with the powers thus conferred must be held to be repealed or supplied thereby. * * * The Public Service Company Law was intended to establish a complete and uni-

form system throughout the State for the enforcement of such powers as were conferred upon the Public Service Commission by that statute, and even if the act did not so provide in express terms it would operate as a repeal of former statutes inconsistent with its provisions."

Same case in lower court, 28 York Legal Record, 193 (C. P. York County, 1915), per Wanner, P. J., at pp. 195-196:

"In the most detailed and specific manner the 'Public Service Company Law' of 1913, turned over all those matters which by the Acts of 1874, and of June 27th, 1913, had been placed in the control of the courts, and of cities of the third class, to the control of the 'Public Service Commission' in the first instance, and upon appeal from its decisions, to the exclusive jurisdiction of the Court of Common Pleas of Dauphin County, Pennsylvania; Bellevue Borough vs. Ohio Valley Water Co., 245 Pa., 114.

* * * * * * *

"One cannot read the many detailed and exhaustive specifications of the 'Public Service Company Law' on every possible branch of the control and regulation of such companies by the 'Public Service Commission,' as they are set forth in the Act of July 26th, 1913, without being convinced of the intent and purpose of the Legislature, to thereby establish a complete, uniform and statewide system, for the operation, control and regulation of public service companies. Indeed, in Sec. 1, Art. I of said Act, covering the control and regulation of the

'facilities' of such companies, by said Commission, the Act itself expressly includes within the definition of the term 'facilities' the very mechanical devices in question in this case, viz: water meters. This interpretation of the intent of the Legislature, and of the scope of the powers of the 'Public Service Commission,' has constantly been acted upon by the 'Commission' itself, and is apparently the one adopted by the Appellate Courts in such cases as have arisen since the passage of said acts; Thompson et al. vs. Erie Co. Electric Co., 17 Dauphin Co. Rep. 302; Meter vs. Metropolitan Electric Co., 17 Dauphin Co. Rep. 313; Discounts & Penalties Case, 18 Dauphin Co. Rep. 94; Mehard vs. New Arlington Water Co., 18 Dauphin Co. Rep. 46.

"In Bellevue Bor. vs. Ohio Valley Water Co., 245 Pa., 116, the Court held that 'in all cases involving in any of their aspects, the reasonableness or unreasonableness of water rates,' the Act of July 26th, 1913, P. L. 1374, has repealed the Act of April 29th, 1874, P. L. 73, which gave the courts power to determine questions of that character, and has conferred it upon the 'Public Service Commission,' to whom such cases must be submitted in the first instance, 'That is now the declared statutory policy of the law, and it is binding not only upon the parties but upon the courts as well. See also New Brighton Bor. vs. New Brighton Water Co., 247 Pa., 232.

"It would be entirely at variance with the legislative intent to establish a general and uniform system for the regulation of public service companies by the 'Public Service Commission,' to permit cities of the third class to regulate the measurement of gas, water and electric currents, and the inspection of all meters used in meas-

uring the same within their limits, with power also to inflict penalties upon said companies for violation of City ordinances on those subjects.

"If both be permitted to stand, the Acts of June 27th, 1913, and of July 26th, 1913, would create two contemporaneous, conflicting jurisdictions relating to the same matters, vested in separate non-judicial bodies, each having punitive powers over all public service companies, but with no control over each other. Under the Act of July 26th, 1913, an appeal would lie from the rulings of the 'Public Service Commission' to the Court of Common Pleas of Dauphin County, but none from the ordinances of the City of York to said Court, and none would survive to the York County Courts, because its power to regulate such matters under the Act of 1874, was repealed by the Act of July 26th, 1913. Such a condition would be intolerable, and would under some circumstances render impracticable any prompt, regular and efficient public service by such companies as the plaintiff. It seems entirely clear that the provisions of clauses 31 and 46, of Sec. 3, Art. V, of June 27th, 1913, are 'inconsistent with' and 'supplied by' the Act of July 26th, 1913, so that they fall within the expressed intent of the Legislature, that they should be repealed. It is also manifest that they are so repugnant especially in view of the penalties that may be imposed on Water Companies by both the Commission and the City, respectively, that they cannot 'be harmonized together and both be concurrently enforced.' Under such circumstances it is held that the latter act necessarily implies the repeal of the former, without any express negation of it; Westfield Bor. vs. Tioga Co., 150 Pa. 52; Johnson Estate, Pa. 511; Election Case, 110 Pa. 502; U. S. vs.

Tynan, 11 Wallace 92. When the reasonable inference from a new act is that a new and uniform system is to be established generally throughout the state, without any exception, then the earlier Act must be held repealed; Emsworth Bor., 5 Pa. Super. Ct. 31; Long vs. Phillips, 241 Pa. 246; Comth. vs. Prison Keeper, 49 Pa. Super. Ct., 647-652; Comth. vs. Brown, 25 Pa. Super. Ct., 269; Jenkins vs. Scranton, 202 Pa. 271; Fort Pitt Assn. vs. Model Plan Assn., 159 Pa., 308."

Borough of Mount Union vs. Mount Union Water Co., 256 Pa. 516 (1917), per Head, J., in the lower court (whose opinion was adopted by the Supreme Court), at pp. 518-519:

"The Act of July 26th, 1913, P. L. 1374, creating the Public Service Commission, declares in Section 1, Article IV, that it is 'an administrative body or commission for the purpose of regulating public service companies.' The basic character of the newly created body is thus clearly defined. To enable such a body to execute the avowed legislative intent in creating it, to wit, the regulation of public service companies in the State of Pennsylvania—it was necessarily invested with powers far reaching in extent and productive of possible results of vital importance not only to those immediately affected by them but as well to the whole body of the State. The general scope of these powers is well summarized in Section 1 of Article V of the act which again begins by declaring 'The commission shall have general administrative power and authority as provided in this act, to supervise and regulate all public service companies doing business within this Commonwealth.' As many of the orders made even by such an administrative

commission in the proper execution of its powers would necessarily have the effect of a judicial judgment or decree affecting the property rights of the citizen, any party aggrieved thereby was allowed an appeal to the Court of Common Pleas of Dauphin County. Without attempting to advert to the sections of the act relating to the procedure in that court or to the cases in which the appeal was to be taken to the court of the particular county in which the property taken, etc., was situate, we find the legislative intent in allowing appeals generally expressed in Section 22 of Article VI. It is brief, and we quote it:

" 'At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law.'

"By the Act of June 3, 1915, P. L. 779, the legislature saw fit to amend certain sections of the Act of 1913, so as, inter alia, to make the appeal allowed by the last named act to this court instead of the Court of Common Pleas of Dauphin County. Section 22 of the Act of 1913, just quoted, was neither amended nor repealed. It still measures the scope and purpose of our revisory powers, so far as conferred by this act, as it did those of the Court of Dauphin County. There is nothing in the Act of 1915 to warrant the conclusion that the legislature intended to make the Superior Court a second administrative commission. The statute neither requires nor authorizes this Court to fix and determine for itself the rate, charge, etc., that a pubilc service company may exact. Our function is, as the statute declares, but to decide whether or not the appellant has discharged the burden cast on him by the legislature. Or in the words

of the act 'our inquiry, etc.' Our inquiry therefore must be, was the order appealed from, as shown by the record certified to us by the commission, reasonable and in conformity with law."

Ben Avon Boro. vs. Ohio Valley Water Co. (No. 1), 260 Pa., 289 (1918), the case at bar, per Potter, J., at pp. 296-297, 309:

"In the case of Mt. Union Boro. vs. Mt. Union Water Company, 63 Pa. Superior Ct., 337, the Superior Court defined its functions in dealing with appeals from the orders of the Public Service Commission. It there said (p. 341): 'By the Act of 1915 the legislature saw fit to amend certain sections of the Act of 1913 so as, inter alia, to make the appeal allowed by the last named act to this court instead of the Court of Common Pleas of Dauphin County. Section 22, of the Act of 1913, just quoted, was neither amended nor repealed. It still measures the scope and purpose of our revisory powers, so far as conferred by this act, as it did those of the court of Dauphin County. There is nothing in the Act of 1915 to warrant the conclusion that the legislature intended to make the Superior Court a second administrative commission. The statute neither requires nor authorizes this court to fix and determine for itself the rate, charge, etc., that a public service company may exact. Our function is, as the statute declares, but to decide whether or not the appellant has discharged the burden cast on him by the legislature. Or in the words of the act our inquiry, therefore, must be, was the order appealed from, as shown by the record certified to us by the commission, 'reasonable and in conformity with law?' And in B. & O. R. R. Co. vs. Public Service Com-

mission, 66 Pa. Superior Ct., 403, the Superior Court again said (p.412): 'Establishing a schedule of the rates or tolls that a public service company may lawfully demand is one of the most complicated and important of all the many important tasks imposed by the legislature on the Public Service Commission. The proper determination of such questions necessarily involves the consideration of many matters and things far removed from the atmosphere of an appellate court of law.'

This concise interpretation of our statute, defining the function of the court in dealing with appeals from the orders of the Public Service Commission, is in accord with the general principle announced in the decisions of the Supreme Court of the United States dealing with appeals from the orders of the Interstate Commerce Commission, and it is also in harmony with the decisions of the Supreme Courts of various states, dealing with appeals from the orders of Public Service Commissions."

* * * * * * *

"Much must be left to the sound discretion of the appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties. Its report must, of course, justify itself in reason, upon review in the appellate courts.

A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable.

The order of the Superior Court is, therefore, reversed, and the order of the Public Service Commission is reinstated; the costs in the Superior Court and in this court to be paid by the Ohio Valley Water Company."

Public Service Commission vs. Baltimore & Ohio R. R. Co., 260 Pa., 323 (1918), per Brown, C. J., at p. 325:

"The railroad company appealed to the Superior Court, and from its decree reversing the Public Service Commission and dismissing the complaint we have this appeal by the commission. Its right to appeal seems to be questioned by the appellee. The appellant bases its right to appeal on Section 30 of the Act of June 3, 1915, P. L. 779, which gives any party to the record aggrieved by the final judgment, order or decree of the Superior Court, a right to appeal to this court. By the Twenty-first Section of Article VI of the Act of July 26, 1913, P. L. 1374, it was made the duty of the Public Service Commission to file an answer to an appeal taken from its action, and the case was to be considered at issue on the answer in the Court of Common Pleas of Dauphin County. By fair implication this provision extends to appeals which are now taken directly to the Superior Court, and, if so, the Public Service Commission may be said to become a party to the record by the filing of its answer. The policy of the statute seems to be that it shall have an opportunity to vindicate its own action on an appeal from it."

Leiper vs. Baltimore & Philadelphia R. R. Co., 262 Pa., 328 (1918), per Fox, J., at pp. 332-334:

"A public service company is granted its franchise by the State so that it may properly and efficiently

serve its people. This grant is made subject to the reserved power of the Commonwealth to supervise and regulate the exercise of the franchise, and in the case of rates, to increase or decrease them as the public interest, as distinguished from mere private interest, may demand. It was necessary, therefore, to have some tribunal to regulate and determine questions of this character relating to the reasonableness of rates, and the legislature has wisely provided such a tribunal in the Public Service Commission. The fact that the action of the Public Service Commission can by proper proceedings be *reviewed by the courts* furnishes the appellee with a full opportunity to be properly protected in the enjoyment of his rights. If the rate fixed in his contract is under all the circumstances a proper rate, this can be *judicially determined.* The fact that no complaint was made to the commission when the change of the rate was filed does not prevent the appellee from subsequently entering a complaint of this character: Art. V, Sec. 4, of the Act of July 26, 1913; Baltimore & Ohio Railroad Company vs. Public Service Commission, 66 Pa., Superior Ct., 403.

"The question here presented is not new, but has arisen in a number of cases recently decided by this court in which it is held that, as the law now stands, in cases of this character a court of equity is without the necessary jurisdiction to make a decree.

"In the case of the St. Clair Borough vs. Tamaqua & Pottsville Electric Ry. Co. et al., 259 Pa., 462, this court said:

" 'Since the Public Service Company Law has been upon our books, we have consistently adhered to the

rule that matters within the jurisdiction of the commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (Bethlehem City Water Company vs. Bethlehem Borough, No. 2, 253 Pa., 333, 337-8; New Brighton Borough vs. New Brighton Water Co. et al., 247 Pa., 232, 242); and it is plain that orderly procedure requires an adherence to this practice, otherwise different phases of the same case might be pending before the commission and the courts at one time, which would cause endless confusion. Under the established system, the commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well-regulated review by the courts, when and where all questions of law may be raised and determined; and this is not so because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose.'

"In the case of Bellevue Borough vs. Ohio Valley Water Company, 245 Pa., 114, the court said:

" 'If this case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the section of the Act of April 29, 1874, P. L. 73, which gave courts the power to determine questions of this character, was repealed by the Public Service Company Law, approved July 26, 1913, P. L. 1374. In other words, the legislature took this power away from the courts and conferred it upon the Public Service Commission. Hereafter, so long as

the Act of 1913 remains in force, the question of reasonableness of rates established by public service corporations, must in the first instance be submitted to the Public Service Commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well. We do not know that this position is seriously controverted by learned counsel for either side of the present controversy.'

"The view reaffirmed in the St. Clair case, supra, has been adopted in the late case of Klein-Logan vs. Duquesne Light Company, 261 Pa., 526, and in V. & S. Company vs. Gaslight Company, 261 Pa., 523. In both these cases the court held that equity was without jurisdiction to enforce a rate contract, and that the application must be made in the first instance to the Public Service Commission." (Italics ours.)

West Virginia Pulp & Paper Co. vs. Public Service Commission, 61 Pa. Superior Ct., 555 (1915), per Henderson, J., at pp. 569-571:

"Criticism is made of the statute because no amendment is made of the eighteenth section of the Act of 1913, which provides that in case of appeal the commission shall certify the record of its proceedings to the proper Court of Common Pleas as hereinabove provided and of the nineteenth section, which provides that an allowance shall be necesasry from the proper Court of Common Pleas in order that an appeal shall operate as a supersedeas of the order appealed from. The omission to strike out of these sections the words 'common pleas' was evidently an oversight, but when we read the title of the act and the third section amending Section 17 of

the Act of 1913 we have no doubt that the intention of the legislature is manifest to make the amendments apply to the whole statute so far as necessary. The act recites certain sections to be amended in certain respects and proceeds 'and to provide for the taking of appeals from the findings, determinations or orders of the commission to the Superior Court instead of to the Court of Commons Pleas of Dauphin County; vesting in the Superior Court the jurisdiction to hear and determine said appeals which is now vested in said Court of Common Pleas of Dauphin County; the same to be subject to an appeal to the Supreme Court; and so as to make the other necessary changes due to the said substitution of the Superior Court of Pennsylvania for the Court of Common Pleas of Dauphin County as the court by which appeals from the findings, determinations and orders of the commission shall be determined.' The act then proceeds in the third section to substitute the Superior Court for the Court of Common Pleas of Dauphin County and transfers the jurisdiction on appeal to the Superior Court instead of the Court of Common Pleas of Dauphin County. The title of an act is part of it and is properly used in interpreting its words: Perkins vs. Philadelphia, 156 Pa., 554; Moore vs. Chartiers Valley Water Co., 216 Pa., 457, and the statute is to be interpreted according to the rule which prohibits the taking of a single sentence even though it form a separate section of a statute and construing it apart from the context or without regard to the subject matter and the general purpose sought to be accomplished: Small vs. Small, 129 Pa., 366. The literal construction of a section in the statute ought not to prevail if it is opposed to the intention of the legislature apparent from the

consideration of the whole statute: Rhodes vs. Iowa, 170 U. S., 412; Gage vs. Chicago, 201 Ill., 93. It is a rule of construction that where the words of a statute are susceptible of two constructions, one of which will lead to an absurdity, the other not, the latter should be adopted though it be a liberal instead of a literal construction: Lancaster County vs. Frey, 128 Pa., 593. The construction contended for by the intervenors would make the statute impossible of application so far as it relates to appeals from the orders of the commission and would defeat the obvious purpose of the legislature as expressed in the whole act. There is sufficient to show that it was the intention to have the record certified to the Superior Court and the order of supersedeas entered in that court. We cannot say, therefore, that the statute is 'incongruous and unworkable.' Upon a review of the whole subject it is our conclusion that the reasons assigned by the intervenors in their motion to quash the appeal are not sufficient and the rule to quash is, therefore, overruled and discharged."

Relief Electric Light, Heat and Power Co.'s Petition, 63 Pa. Superior Ct., 1 (1916), per Kephart, J., at pp. 9-10:

"In cases of regulation and limitation, the courts will review the reasonableness of the order or regulation and in so determining will inquire whether property has been taken without due process of law or contract rights have been violated unreasonably. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation: Stone vs. Farmers, etc., 116 U. S., 307, 331. Concerning the duty of the courts with respect to this question, it was stated in Chicago,

etc., Railway Co. vs. Minn., 134 U. S., 418, 457, in which case an attempt was made to deprive courts of the power to investigate the reasonableness of the regulations made by commissions, the statute as construed by the Supreme Court of Minnesota 'conflicts with the Constitution of the United States. * * * It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessiong the machinery of a court of justice.' And, in the same opinion, reaffirmed in Chesapeake, etc., Telephone Co. vs. Manning, 186 U. S., 238, 'The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States.' The Public Service Act expressly provides for an *appeal* to the courts. By Section 17 of Article VI. any party to the proceedings affected may appeal to this court. Sections 22 and 24 of the same

article provide that the court, upon the record as certified by the commission, shall determine whether or not the order appealed from is reasonable and in conformity with law; and the 18th section of the same article stipulates that the record shall include the testimony, findings of fact, a copy of all orders, and a copy of the opinion. The duty is imposed on this court to examine all matters presented to the commission, but the burden is nevertheless on the appellant to show that the commission acted unreasonably or without evidence or contrary to the manifest weight of the evidence." (Italics ours.)

West Virginia Pulp & Paper Co. vs. Public Service Commission, 65 Pa. Superior Ct., 5 (1916), per Henderson, J., at pp. 8-9:

"The sufficiency of the proof must be left in a large degree to the sound judgment of the commission, and where that judgment has been exercised on competent and relevant evidence the conclusion ought not to be disturbed by *judicial* interference unless it is made clearly to appear that it is unreasonable or not in conformity with law. At the hearing of an appeal the question for the court to determine is whether or not the order is reasonable and in conformity with law and in all such cases the orders of the commission are declared by the statute to be *prima facie* evidence of the reasonableness thereof and the burden of proving the contrary rests on the appellants. It was evidently not in legislative contemplation to substitute the appellate court for the commission *in the disposal of administrative questions.*" (Italics ours.)

Jenkins Township vs. Public Service Commission, 65 Pa. Superior Ct., 122 (1916), per Kephart, J., at p. 137:

"In cases of regulation and limitation the courts will review the reasonableness of the regulation, and in so determining will inquire whether property has been taken without due process of law or contract rights have been violated."

McCrady Bros. Co. vs. Pittsburgh & Lake Erie R. R. Co., 66 Pa. Superior Ct., 307 (1917), per Trexler, J., at pp. 311-312:

"The Public Service Commission fixed the following rates per net ton on sand and gravel from Braddock (P. & L. E. R. R.) to Wilkinsburg, Pa., 30 cents; Wilmerding, Pa., 37 cents; East Pittsburgh, Pa., 37 cents; Jeannette, Pa., 53 cents; Greensburg, Pa., 53 cents; Indiana, Pa., 62 cents, which rates it found and determined to be just and reasonable and remunerative to the carriers. The carriers complained against having appealed from the decision of the Public Service Commission, it remains for us to determine whether or not the above rates are reasonable and in conformity to law. In considering the question involved we are confined to the record as presented to us. The Public Service Commission Act of July 26, 1913, P. L. 1374, Art. V, Sec. 3, provides that the commission shall determine all matters presented to them after hearing and (Art. VI, Sec. 18) that a record shall be made of the testimony taken therein and findings if any based upon such testimony. Upon appeal this court is charged with the duty of inquiring, whether upon the record, the order is reasonable and in conformity with law (Sec. 22), the order

of the commission being *prima facie* evidence of its reasonableness and the burden being upon the appellant of proving the contrary and the notes of testimony are to be considered as the testimony in the case (Sec. 23). If the Superior Court upon the record find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or otherwise not in conformity to law, it may reverse the order of the commission (Sec. 24)."

Baltimore & Ohio R. R. Co. vs. Public Service Commission, 66 Pa. Superior Ct., 403 (1917), per Head, J., at pp. 412-413:

"The functions of this court upon appeals from orders of the Public Service Commission have been plainly stated in Borough of Mount Union vs. Mount Union Water Co., 63 Pa. Superior Ct., 337, and in West Virginia Pulp Co. vs. The Public Service Commission, not yet reported. We have declared in those decisions that the statute exhibited no legislative intent to convert the Superior Court of Pennsylvania into a second administrative tribunal, or to place upon the shoulders of the judges of that court the duty of examining and weighing all of the evidence and determining for itself what would be a reasonable rate for the transportation of any commodity.

"Establishing a schedule of the rates or tolls that a public service company may lawfully demand is one of the most complicated and important of all of the many important tasks imposed by the Legislature on the Public Service Commission. The proper determination of such questions necessarily involves the consideration

of many matters and things far removed from the atmosphere of an appellate court of law. After a patient and careful examination of the record in this case, recognizing as we do that the controlling question was peculiarly within the jurisdiction of the Public Service Commission, we have determined to send back this record with a direction for a further consideration of the question by the commission. We deem it our right that the record should present facts found by the commission from the evidence that will clearly enable us to determine in the discharge of our duties whether or not the conclusion reached by the commission is a reasonable one and in conformity with law. We have indicated in this opinion what we regard as important and material facts not brought before us by this record. If the evidence will warrant the Public Service Commission in finding the facts which will support the order it has made, then the difficulties under which we labor have been merely matters of procedure and can be corrected by an amended report. If the evidence will not warrant such findings, then it would appear to be the duty of the Public Service Commission to dismiss the complaint for lack of such proof as would warrant its interference with the legally established and effective rates complained of."

Pennsylvania R. R. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 575 (1917), per Orlady, P. J., at pp. 580-581:

"We said in B. & O. R. R. Co. vs. Public Service Commission, 66 Pa. Superior Ct., 403, 'The functions of this court upon appeals from orders of the Public Service Commission have been plainly stated in Borough

of Mount Union vs. Mount Union Water Co., 63 Pa. Superior Ct., 337, and in West Virginia Pulp Co. vs. Public Service Commission, (not yet reported). We have declared in these decisions that the statute exhibited no legislative intent to convert the Superior Court of Pennsylvania into a second administrative tribunal, or to place upon the shoulders of the judges of that court the duty of examining and weighing all the evidence and determining for themselves what would be a reasonable rate for the transportation of any commodity.'

"Like reasoning leads to the same result when applied to the facts presented on this appeal."

Buffalo & Lake Erie Trac. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 581 (1917), per Williams, J., at pp. 583-584:

"Upon an appeal from the order of the Public Service Commission we determine whether 'the order appealed from is reasonable and in conformity with the law;' that is to say, whether it is based upon competent evidence: Act of July 26, 1913, P. L. 1374, Sections 22 and 24, Art. VI; Borough of Mt. Union vs. Mt. Union Water Company, 256 Pa., 516, affirming 63 Pa. Superior Ct., 337. No objection was raised to the evidence, so the reasonableness of the order is the only question to be considered."

Rochester Building & Loan Assn. vs. Beaver Valley Water Co., 68 Pa. Superior Ct., 122 (1917), per Kephart, J., at p. 127:

"Before the Public Service Act the reasonableness and applicability of the rules and regulations of water

companies could be considered by the courts, but there is no constitutional direction that such matters should always be determined in those forums. The Legislature may restrict the jurisdiction of the courts and create a new tribunal as *an administrative, non-judicial body,* with exclusive jurisdiction to hear and determine such mattters, (see Com. vs. Hopkins, 53 Pa. Superior Ct., 16; West Virginia Pulp & Paper Co. vs. Public Service Commission, 61 Pa. Superior Ct., 555), *provided an appeal to a court of law is preserved;* Relief Electric L. H. & P. Co.'s Petition, 63 Pa. Superior Ct., 1. 'The power to regulate and control belongs to the legislature, and by it may be delegated to a commission: Stanislaus County vs. San Joaquin, 192 U. S., 201; Railroad Commission Cases, 116 U. S., 307, 336; Atlantic Coast Line R. R. Co. vs. North Carolina Commission, 206 U. S., 1;' Relief Electric L. H. & P. Co.'s Petition, supra. It is not necessary to determine the rights of an individual to ask for a mandatory injunction in aid of a complaint before the commission, where there has been an open violation of the Public Service Act. That question is not before us. We hold that the matter in controversy concerns the reasonableness of an effective rule or regulation of a public service company. Such questions are purely matters for the Public Service Commission, as long as the Act of 1913 is in effect: Bellevue Borough vs. Ohio Valley Water Co., 245 Pa., 114." (Italics ours.)

**Dichl vs. Public Service Commission,* 69 Pa. Superior Ct., 419 (1918), per Orlady, P. J., at p. 421:

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*This case and all of the following cases in the Superior Court in this appendix were decided after the decision of the case at bar by the Pennsylvania Supreme Court. The effect of that decision will be observed in many of them.

"The commission had as full power to revoke the certificate granted to Diehl as it had to grant it upon due cause being shown, and on its finding of fact that the original certificate was improperly granted, the only party affected was given a full hearing, the intervenor moved promptly to secure relief from a certificate in regard to which he had a legal right to be heard. He adopted the only remedy open to him in asking for a rehearing on the original application. The commission is the best judge of a fair interpretation of its own rules, and when such a motion is addressed to the discretion it will not be interfered with, unless an abuse of discretion is manifest."

**V. & S. Bottle Co. vs. Public Service Commission,* 70 Pa. Superior Ct., 308 (1918), per Porter, J., at pp. 311-312:

"The nature of the jurisdiction which we exercise in appeals from the Public Service Commission has frequently been considered, and we must accept certain principles as settled by the decisions. Sections 22 and 23 of Article VI of the Public Service Commission Law determine the nature of the inquiry. 'At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law.' 'In all such cases the orders of the commission shall be *prima facie* evidence of the reasonableness thereof, and the burden of proving the contrary shall be upon the appellant or appellants.' There is nothing in the legislation to warrant the conclusion that

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*See note, p. 23a, supra.

the legislature intended the appellate court to act as a second administrative commission. Our function is to decide whether or not the appellant has discharged the duty cast upon him by the legislature. The inquiry by the court is not whether the order is such as the court would have made in the exercise of administrative functions, but whether it was a reasonable exercise of the discretion conferred upon the commission by the statute; the court is not to substitute its judgment, as to the expediency of a determination, for that of the commission. The legislature did not intend that the courts should interfere with the commission to review its determinations further than is necessary to keep them within the law, *and protect the constitutional rights* of individuals and the corporations over which the commission is given control: Mt. Union Borough vs. Mt. Union Water Co., 63 Pa. Superior Ct., 337 and 256 Pa., 516; Relief Electric Light, Heat & Power Co.'s Petition, 63 Pa. Superior Ct., 1; Jenkins Township vs. Public Service Commission, 65 Pa. Superior Ct., 122; Pennsylvania Power Co. vs. Public Service Commission, 66 Pa. Superior Ct., 448, and Ben Avon Boro. vs. Ohio Valley Water Co., 260 Pa. 289." (Italics ours.)

**Franke vs. Johnstown Fuel Supply Co.*, 70 Pa. Superior Ct., 446 (1918), per Henderson, J., at pp. 451-452:

"It becomes very clear from an examination of the statute creating the Public Service Commission and declaring the jurisdiction thereof and the procedure to be observed in proceedings to be brought before that body

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*See note, p. 23a, supra.

as well as in the declaration of the form in which its conclusions shall be made that *it is not a court of law.* It has quasi judicial functions, but they are administrative in character and its jurisdiction must be found in the statute which brought it into existence and its amendments: W. Va. Pulp & Paper Company vs. Public Service Commission, 61 Pa. Superior Ct., 555. The right of appeal is therefore necessarily statutory, and the conditions under which this right may be exercised are to be found in the provisions for such appeals." (Italics ours.)

**Bethlehem City Water Co. vs. Public Service Commission,* 70 Pa. Superior Ct., 499 (1918), per Head, J., at p. 501:

"In granting a certificate of public convenience the commission confers no new chartered powers on any company. It takes away from no company any right or power then legally existing. As it is not a judicial body, but an administrative one, its order, made from the standpoint of the public convenience solely, cannot be made the foundation for the judicial determination of what franchises do or do not belong to any corporation interested. Such matters must be determined as heretofore in a legal proceeding properly instituted in the courts for that purpose."

**Beaver Valley Water Co. vs. Public Service Commission,* 71 Pa. Superior Ct., 43 (1919), per Kephart, J., at pp. 48-51, 52, 53:

"In Ben Avon Boro. vs. Ohio Valley Water Co., 68 Pa. Superior Ct., 561; 260 Pa., 289, we considered the

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*See note, p. 23a, supra.

legal propositions as they bore upon the several questions presented by this appeal. In that case the court, following the direction of the Public Service Act, considered Section 22 of Article VI, of the Public Service Act that required this court upon the record to determine whether the order appealed from was reasonable and in conformity with law. By Section 23 of the same act, the notes of testimony were made part of the record of the case. If, from this record the order did not appeal to the court as being a reasonable order, either from failure to consider items of value properly proven, or from a manifest disregard of evidence, or from reliance upon incompetent evidence, we were required to proceed as the law directed. The act plainly directed the evidence be reviewed, although in no event were we required to act as second administrative commission. In the Ohio Valley case we endeavored to point out where the commission had failed to allow items of value clearly proven and where there was little, and in some instances no testimony, to sustain its action, and where it had erred in its legal conclusion. In so directing, this court refrained as far as it was able from discussing or passing on questions where the evidence was fairly in dispute and the facts were found. The commission neglected to give the values claimed, not because they were not there, but because it, as a commission, did not believe them proper items of rate-making value or claimed that some were insufficiently proven. On review by the Supreme Court, the concluding paragraph of the opinion marks the line for this court's consideration. 'Much must be left to the sound discretion of the appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties. Its report must, of course, justify itself in

reason, upon review in the appellate courts.' Our conclusions in that case were declared to be a substitution by this court of our judgment for that of the commission's. In effect, matters such as here considered by the commission were directed by the Supreme Court to be treated as discretionary matters within the control of the commission. This court was in error in holding that the legislature did not intend the commission's authority to be wholly discretionary, but as it was dealing with substantial property rights its duty was fixed, and if the commission failed in its duty, the way was open to the courts to enforce it.

"We will not discuss at length the testimony taken in the present appeal. For the purpose, however, of illustrating the effect of the final judgment of the Supreme Court: when we made the order in the Ohio Valley case returning to the commission the record with direction to consider items of value that had been omitted, among those items was one of going concern value, the largest item in dispute. This same value is presented in this appeal. We pointed out that while the commission said it would consider going concern value, as a matter of fact it did not allow anything for that value. We pointed to the schedule of reproduction cost, new, less depreciation, made by the commission, as printed on page 565, 68 Pa. Superior Ct. There are enumerated the several items of this cost, and these items in round figures amounted to $995,000. The commission did not contemplate, nor was it ever contended in that case, that the item of going concern value or cost was divisible, to be attached to each of the separate items of physical property enumerated in that schedule. These items represented what it would actually cost—material, ground, labor, etc.—to reproduce

the 'bare bones' of the plant. The original cost of the property, part of which it was admitted could not be ascertained, as found by the commission, was $841,000, in round figures, not including sufficient amounts for interest during construction, engineering, general administration and other items; but, as is shown, the normal increase in the value from the time of purchase to the present time of this physical property would make the difference between rate-making value and the partial original cost as found by the commission, the records as to part of which were lost. This rate value, as fixed by the commission, was in round figures $924,000. There was no place in the commission's findings for going concern value. It was not allowed. The record returned would have required a value for this item, determined by the testimony then before the commission, or from such other testimony it desired to secure. It was stated no claim was made that the stockholders suffered by reason of dividends being unduly deferred while the business was being built up. We do not see how deferred dividends could form any basis to fix going concern cost. The earnings of the company may go towards improvements, such as extensions, in which case the stockholders benefit in increased plant account. Whether the stockholders put any or all the money into the concern from their own purses, or use borrowed money, is not the chief concern before the commission, although it may aid on the question of good faith to the public. The commission does not act on the theory that issues of stock are controlling or are evidence to establish value. In the Ohio Valley case, as the bonds and indebtedness were $200,000 more than the value for rate-making purposes, the stockholders, under the commission's orders, were held to be entitled to nothing.

The earnings were barely sufficient to pay the interest on outstanding obligations, without considering a sinking fund to retire bonds as they fell due. What we thought the commission should strive to secure is the present value for rate purposes.

"In the present case, any reason which we might give for sustaining the item of going value would not be any more convincing than was given in the Ohio Valley case, and the Supreme Court held our action in that case was a substitution of our judgment for that of the commission's. It may be readily seen how that case controls the present one. There might be this possible difference in the present case. The commission said: 'Upon the basis of the reproduction cost new method of ascertaining value for rate-making, the commission finds that the respondent has failed to sustain its claim for going value.' There was considerable evidence to establish this value, but the action of the commission in the Ohio Valley case did not differ from its unequivocal action in the present case. It did not allow the value in either case."

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"Where there is a conflict of testimony and the commission has found the facts, this court has always held that the action of the commission was final unless it was plainly against the manifest weight of the evidence. But, there is a decided difference between weighing disputed evidence and ascertaining whether the commission has refused to consider competent evidence properly before them. * * * The other item of value was 'K,' the water power dam, sometimes known as the Eastville dam. The west abutment was constructed by the Pittsburgh & Lake Erie Railroad

Co. It was built of heavy masonry, constructed with openings for developing the water power available at the west end of the dam. Such was the testimony of the appellant, and without which it would require an extension of one hundred and twenty feet to reach the western bank of the river. There does not seem to be any question about the ownership of this part of the dam. The value was not allowed by the commission for the reason it was stated that the company had paid nothing for this improvement and should, therefore, not be allowed its value. The record does not seem to be as clear on this proposition as appellant seems to contend for, but if it is as they have argued it, we do not understand why the commission should refuse to give value to the company for the piece of property that they were presented with. Under the rules laid down by the Supreme Court in the Ohio Valley case, any opinion different from the commission would be but a substitution of our judgment. It is a claim that rises no higher than brokerage, interest paid during construction, going concern value, real estate owned by the company, and other items that have heretofore been discussed. We can add nothing to what the Supreme Court has said and what this court has said in a similar case. As the decision of the Supreme Court is binding on this court, we must affirm the order of the commission at the cost of the appellant."

**Schuylkill Ry. Co. vs. Public Service Commission*, 71 Pa. Superior Ct., 204 (1919), per Orlady, P. J., at p. 206:

"We have held a number of times that the functions of this court upon appeals from orders of the

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*See note, p. 23a, supra.

Public Service Commission, as stated in Mount Union vs. Mount Union Water Co., 63 Pa. Superior Ct., 337, and West Virginia Pulp Company vs. Public Service Commission, 65 Pa. Superior Ct., 5, and other cases exhibited no legislative intent to convert the Superior Court of Pennsylvania into a second administrative tribunal, or to place upon the shoulders of the judges of that court the duty of examining and weighing all the evidence and determining for themselves what would be a reasonable conclusion: Pennsylvania Railroad Co. vs. Public Service Commission, 67 Pa. Superior Ct., 575."

**Harmony Electric Co. vs. Public Service Commission,* 71 Pa. Superior Ct., 355 (1919), per Porter, J., at p. 360:

"We have repeatedly said that this court is not a second administrative body and we have no authority to substitute our judgment for that of the commission in the decision of such questions. We would not be warranted in reversing the determination of the commission save in a case which involved a manifest and flagrant abuse of discretion."

**Foltz vs. Public Service Commission,* 73 Pa. Superior Ct., 24 (1919), per Williams, J., at pp. 34-35:

"In analyzing the cases construing the Act of 1913, two principles stand out prominently: (1) *we do not weigh the testimony, but only examine it to see if there is any evidence to sustain the findings;* if the evidence is properly taken and competent; and whether the proper legal principles, especially as to jurisdiction, statutory and common law, and substantive rights, con-

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*See note, p. 23a, supra.

stitutional, statutory and common law, have been regarded and applied, all of which are elements to be considered in arriving at a conclusion as to whether the order appealed from is reasonable and in conformity with the law; and (2) that the Act of 1913 is a proper exercise of the police power delegating to the commission absolute and exclusive authority to declare the policy of the State in matters of public concern, relating to public service companies, and that this power includes the right to declare that any element of the consideration, especially a continuing obligation such as an agreement not to charge more than a given rate of fare, entered into in consideration of the consent of a municipality to the use of its streets by a street railway company can be declared void, either temporarily, or for all time, if, in the opinion of the commission, it would operate to the detriment of the public in interfering with the efficiency of the service of such public service company or amounts to a confiscatory rate. This power to declare what is public policy under any given state of facts is an exclusive delegation to the commission. It cannot be seriously questioned, and appellant presents no compelling authorities to the contrary, that this delegation of the police power is proper, in so far as the right to declare conditions in such contracts relating to rates, contrary to public policy when entered into in pursuance of common law or statutory authority, and the exercise of this delegated authority is not an impairment of a contract within the Federal Constitution."

(This case makes it plain that our contention as to the ruling of the Pennsylvania Supreme Court in the

case at bar [reply brief, pp. 5-21], cited at p. 29 of the report, is correct.)

**Damiani vs. Public Service Commission*, 73 Pa. Superior Ct., 37 (1919), per Porter, J., at p. 41:

"The finding of facts by the commission having been supported by competent evidence we would not be warranted in declaring it to be unreasonable, nor is there any ground for holding that the determination was not in conformity with law."

(This case also makes it plain that our contention as to the ruling of the Pennsylvania Supreme Court in the case at bar [reply brief, pp. 5-21] is correct.)

**Henderson Coal Co. vs. Public Service Commission,* 73 Pa. Superior Ct., 45 (1919), per Porter, J., at p. 52:

"What is the reasonable amount which a carrier may be required to take the risk of keeping over night at any given point of shipment? That is an administrative question rather than one of law. It is a question of fact, or at least a mixed question of law and fact. This is one of those questions which must be left in a large degree to the sound judgment of the commission, and when that judgment has been exercised upon competent and relevant evidence the conclusion ought not to be disturbed by judicial interference unless it is made clearly to appear that it is unreasonable and not in conformity with law. In such cases the orders of the commission are declared by the statute to be *prima facie* evidence of the reasonableness thereof and the burden of establishing the contrary rests on the

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*See note, p. 23a, supra.

appellant. In determining questions of fact, or mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power, it will not consider the expediency or wisdom of the order, or whether on like testimony it would make a similar ruling. After full consideration of the evidence we are unable to find any satisfactory ground upon which to rest the conclusion that the order entered is so manifestly unreasonable as to justify its reversal, nor is there any reason for holding that it is not in conformity with law; West Va. P. & P. Co. vs. Public Service Commission, 65 Pa. Superior Ct., 5; Ben Avon Boro. vs. Ohio Valley Water Co., 260 Pa., 289."

**Smith vs. Public Service Commission,* 8 Pa. Corporation Reporter, 210 (Superior Ct., 1919), per Porter, J., at pp. 211-212:

"The Public Service Commission has found that O. C. Smith was a common carrier, which finding must be assumed as *prima facie* correct and true. We can only reverse it in case the appellant here has met the burden imposed upon him by the statute and satisfied us that the order is unreasonable and not in conformity with law. *The court will not examine the facts further than to determine whether there was competent substantial evidence to sustain the order.* We have carefully considered the evidence in the present case and find nothing in it which would warrant a finding that this appellant had himself, or through any authorized agent, acted as or held himself out to be a common carrier. The appellant was a carpenter and worked at

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*See note, p. 23a, supra.

his trade. He owned a Ford car, which his son was in the habit of using, and the son at times carried passengers in the car for hire, but there was no evidence that the appellant had any interest in or knowledge of what the son was doing. The finding of the Commission was without evidence to support it, and for that reason must be reversed: Mt. Union Boro. vs. Mt. Union Water Co., 63 Pa. Superior Ct., 343; *Ben Avon Boro. vs. Ohio Valley Water Co.*, 260 Pa., 297." (Italics ours.)

(This case also makes it plain that our contention as to the ruling of the Pennsylvania Supreme Court in the case at bar [reply brief, pp. 5-21] is correct.)

•*Borough of Franklin vs. Public Service Commission,* 8 Pa. Corporation Reporter, 212 (Superior Ct., 1919), per Linn, J., at p. 214:

"The Commission then made the order now appealed from, and to support the appeal appellant now asserts:

"'(a) That the Commission is without jurisdiction, and

"'(b) That the order is not in accordance with the agreement.'

"The petition undoubtedly states a case within the jurisdiction of the Commission, Public Service Company Law, Article V, Section 12, Act of July 26, 1913, P. L. 1374, as amended by Act of June 17, 1917, P. L. 1025, but the essential averments remain to be proved. As has been stated, the agreement of counsel was not specific, nor was the acquiescence by the Commission less general. The parties doubtless all acted in good faith but they made a record for review by this Court which obviously can not be the basis of final disposition of the cause.

•See note, p. 23a, supra.

"The statute imposes upon us a duty: is the order reasonable and in conformity with law? The record must sustain the order, and the record at bar is insufficient, as has been suggested.

"In view of the importance of this bridge to the community involved, we have concluded to dispose of this appeal at the first opportunity by the following

ORDER:

"The order of the Commission is reversed and the record returned to the Commission with instructions to proceed with the cause according to law unless the complaint be sooner satisfied."

**Ramsey vs. Public Service Commission,* 8 Pa. Corporation Reporter, 215 (Superior Ct., 1919), per Porter, J., at p. 216:

"With regard to the case of Johnson, there was no evidence which would have warranted a finding that he had ever held himself out to the public as a common carrier or solicited the business of any passenger or ever carried any passenger for hire. There was evidence tending to establish that some other person, not named, while in possession of a motor car which was owned by Johnson, had solicited the business of passengers and had collected money for their transportation. There was not, however, a scintilla of evidence which would have warranted a finding that the person who had done these things, while in possession of Johnson's car, was the servant of Johnson or was acting under the authority of the latter. There being no com-

*See note, p. 23a, supra.

petent evidence to sustain the finding that these appellants, respectively, were common carriers, the Public Service Commission was without jurisdiction to make the orders in question."

APPENDIX B.

Appeals from Public Service Commission to Courts.

(In this table reference is made to the report of the case only in the highest court that has passed upon it. Cases in a higher court are given ahead of cases in a lower court. Cases in the same court are arranged chronologically.)

(a) APPEALS TO COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

Pennsylvania Utilities Co. vs. Lehigh Navigation Electric Co., 254 Pa., 289 (1916).

Consumers Electric Co. vs. Public Service Commission, 17 Dauphin County Reports, 360 (1914).

(b) APPEALS TO SUPERIOR COURT.

Pennsylvania R. R. Co. vs. Public Service Commission, 250 U. S., 566 (1919).

Borough of Mount Union vs. Mount Union Water Co., 256 Pa., 516 (1917).

Ben Avon Boro. vs. Ohio Valley Water Co. (No. 1), 260 Pa., 289 (1918).

Ben Avon Boro. vs. Ohio Valley Water Co. (No. 2), 260 Pa., 310 (1918).

Public Service Commission vs. Baltimore & Ohio R. R. Co., 260 Pa., 323 (1918).

Pennsylvania Power Co. vs. Public Service Commission, 261 Pa., 211 (1918).

City of Pittsburgh vs. Pittsburgh Rys. Co., 259 Pa., 558 (1918).

Jacoby vs. Pittsburgh Rys. Co., 259 Pa., 558 (1918).

Perry County Tel. & Tel. Co. vs. Public Service Commission. 265 Pa., 274 (1919).

Schuylkill Ry. Co. vs. Public Service Commission, 8 Pa. Corporation Reporter, 217 (Supreme Court, 1919).

West Virginia Pulp & Paper Co. vs. Public Service Commission, 61 Pa. Superior Ct., 555 (1915).

Relief Electric Light, Heat & Power Company's Petition, 63 Pa. Superior Ct., 1 (1916).

East End Electric Light, Heat & Power Company's Petition, 63 Pa. Superior Ct., 16 (1916).

Glen Rock Motor Club vs. York & Maryland Line Turnpike Co., 64 Pa. Superior Ct., 147 (1916).

Pennsylvania R. R. Co. vs. Public Service Commission, 64 Pa. Superior Ct., 586 (1916).

West Virginia Pulp & Paper Co. vs. Public Service Commission, 65 Pa. Superior Ct., 5 (1916).

Jenkins Twp. vs. Public Service Commission, 65 Pa. Superior Ct., 122 (1916).

McCrady Bros. Co. vs. Pittsburgh & Lake Erie R. R. Co., 66 Pa. Superior Ct., 307 (1917).

Baltimore & Ohio R. R. Co. vs. Public Service Commission, 66 Pa. Superior Ct., 403 (1917).

Bradley vs. Pennsylvania R. R. Co., 66 Pa. Superior Ct., 428 (1917).

Pennsylvania Power Co. vs. Public Service Commission (No. 2), 66 Pa. Superior Ct., 462 (1917).

Scranton Ry. Co. vs. Fiorucci, 66 Pa. Superior Ct., 475 (1917).

Scranton Ry. Co. vs. Bisignani, 66 Pa. Superior Ct., 478 (1917).

Scranton Ry. Co. vs. Grady, 66 Pa. Superior Ct., 478 (1917).

Scranton Ry. Co. vs. Mason, 66 Pa. Superior Ct., 478 (1917).

Great Bend Township vs. Delaware, Lackawanna & Western R. R. Co., 67 Pa. Superior Ct., 95 (1917).

Pottsville Union Traction Co. vs. Public Service Commission (Moyer's Application), 67 Pa. Superior Ct., 301 (1917).

Pottsville Union Traction Co. vs. Public Service Commission (Brady's Application), 67 Pa. Superior Ct., 304 (1917).

Pottsville Union Traction Co. vs. Public Service Commission (Setzer's Application), 67 Pa. Superior Ct., 307 (1917).

Pennsylvania R. R. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 569 (1917).

Buffalo & Lake Erie Trac. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 581 (1917).

Philadelphia & Reading Ry. Co. vs. Public Service Commission, 67 Pa. Superior Ct., 604 (1917).

Lycoming Edison Co. vs. Public Service Commission, 67 Pa. Superior Ct., 608 (1917).

Coverdale Electric Light Co. vs. Public Service Commission, 68 Pa. Superior Ct., 351 (1917).

Harmony E. Co. vs. Shenango Twp. L. Co. (and six other appeals), 68 Pa. Superior Ct., 354 (1917).

Baltimore & Ohio R. R. Co. vs. Public Service Commission, 68 Pa. Superior Ct., 503 (1917).

Philadelphia Suburban Gas & Electric Co. vs. Public Service Commission, 69 Pa. Superior Ct., 355 (1918).

Schuylkill Light, Heat & Power Co. vs. Public Service Commission, 69 Pa. Superior Ct., 400 (1918).

Pennsylvania R. R. Co. vs. Public Service Commission, 69 Pa. Superior Ct., 404 (1918).

Kane & Elk R. R. Co. vs. Public Service Commission, 69 Pa. Superior Ct., 413 (1918).

Diehl vs. Public Service Commission, 69 Pa. Superior Ct., 419 (1918).

Baltimore & Ohio R. R. Co. vs. Public Service Commission, 69 Pa. Superior Ct., 421 (1918).

Jones vs. Delaware, Lackawanna & Western R. R. Co.; 69 Pa. Superior Ct., 568 (1918).

Pennsylvania Utilities Co. vs. Public Service Commission, 69 Pa. Superior Ct., 612 (1918).

Panther Valley Water Co. vs. Public Service Commission, 70 Pa. Superior Ct., 8 (1918).

Allied Associations of West Philadelphia vs. Public Service Commission, 70 Pa. Superior Ct., 13 (1918).

V. & S. Bottle Co. vs. Public Service Commission, 70 Pa. Superior Ct., 308 (1918).

Franke vs. Johnstown Fuel Supply Co., 70 Pa. Superior Ct., 446 (1918).

Cambria Steel Co. vs. Johnstown Fuel Supply Co., 70 Pa. Superior Ct., 464 (1918).

Wilkes-Barre Co. vs. Public Service Commission, 70 Pa. Superior Ct., 464 (1918).

Fayette County Gas Co. vs. Public Service Commission, 70 Pa. Superior Ct., 472 (1918).

Bethlehem City Water Co. vs. Public Service Commission, 70 Pa. Superior Ct., 499 (1918).

Johnstown vs. Johnstown & Stony Creek R. R. Co., 70 Pa. Superior Ct., 608 (1918).

Beaver Valley Water Co. vs. Public Service Commission, 70 Pa. Superior Ct., 621 (1918).

Pittsburgh, Bessemer & Lake Erie R. R. Co. vs. Public Service Commission, 71 Pa. Superior Ct., 15 (1919).

Beaver Valley Water Co. vs. Public Service Commission, 71 Pa. Superior Ct., 43 (1919).

Harmony Electric Co. vs. Public Service Commission, 71 Pa. Superior Ct., 355 (1919).

Borough of Wilkinsburg vs. Public Service Commission, 72 Pa. Superior Ct., 423 (1919).

City of Reading vs. Public Service Commission, 72 Pa. Superior Ct., 432 (1919).

Borough of North Braddock vs. Public Service Commission, 72 Pa. Superior Ct., 432 (1919).

Harbor Creek Township vs. Public Service Commission, 72 Pa. Superior Ct., 433 (1919).

City of Pittsburgh vs. Public Service Commission, 72 Pa. Superior Ct., 433 (1919).

City of McKeesport vs. Public Service Commission, 72 Pa. Superior Ct., 434 (1919).

New York & Pennsylvania Ry. Co. vs. Public Service Commission, 72 Pa. Superior Ct., 523 (1919).

Foltz vs. Public Service Commission, 73 Pa. Superior Ct., 24 (1919).

Damiani vs. Public Service Commission, 73 Pa. Superior Ct., 37 (1919).

Henderson Coal Co. vs. Public Service Commission, 73 Pa. Superior Ct., 45 (1919).

Borough of Greensburg vs. Public Service Commission, 8 Pa. Corporation Reporter, 196 (Superior Court, 1919).

Smith vs. Public Service Commission, 8 Pa. Corporation Reporter, 210 (Superior Court, 1919).

Borough of Franklin vs. Public Service Commission, 8 Pa. Corporation Reporter, 212 (Superior Court, 1919).

Ramsey and Johnson vs. Public Service Commission (two appeals), 8 Pa. Corporation Reporter, 215 (Superior Court, 1919).

Consolidated Tel. Co. vs. Public Service Commission, 8 Pa. Corporation Reporter, 241 (Superior Court, 1919).

Spontak vs. Public Service Commission, Superior Court, No. 130 April Term, 1919 (not yet reported).

City of Scranton vs. Public Service Commission, Superior Court, No. 179 October Term, 1919 (not yet reported.)

APPENDIX C.

Cases under Act of March 21, 1806.

(This table includes cases in the Supreme and Superior Courts only. Cases in the Supreme Court are given ahead of cases in the Superior Court. Cases in the same court are arranged chronologically.)

Brown vs. Commonwealth, 3 Sergeant & Rawle, 273 (1817).
Commonwealth vs. Evans, 13 Sergeant & Rawle, 426 (1826).
Moyer vs. Kirby, 14 Sergeant & Rawle, 162 (1826).
Todd vs. Patterson, 17 Sergeant & Rawle, 345 (1828).
Wike vs. Lightner, 1 Rawle, 289 (1829).
Mevay vs. Edmiston, 1 Rawle, 457 (1829).
Bowman vs. Herr's Ex'rs, 1 Penrose & Watts, 282 (1830).
Huntingdon, Cambria and Indiana Turnpike Co. vs. Brown, 2 Penrose & Watts, 462 (1831).
Criswell vs. Clugh, 3 Watts, 330 (1834).
Hellings vs. Commonwealth, 5 Rawle, 64 (1835).
Craven vs. Bleakney, 9 Watts, 19 (1839).
Downer vs. Downer, 9 Watts, 60 (1839).
Seider vs. Seider, 5 Wharton, 208 (1839).
Knorr vs. Germantown Rys. Co., 5 Wharton, 256 (1839).
Fromberger vs. Greiner, 5 Wharton, 350 (1839).
Spigelmoyer vs. Walter, 3 Watts & Sergeant, 540 (1842).
Thomas vs. Simpson, 3 Pa., 60 (1846).
Strickler vs. Sheaffer, 5 Pa., 240 (1847).

Chestnut Hill Turnpike Co. vs. Martin, 12 Pa., 361 (1849).
McKinney vs. Monongahela Navigation Co., 14 Pa., 65 (1850).
Myers vs. Black, 17 Pa., 193 (1851).
Weller vs. Weyand, 2 Grant's Cases, 103 (1853).
Ashford vs. Ewing, 25 Pa., 213 (1855).
Commonwealth vs. Garrigues, 28 Pa., 1 (1857).
Commonwealth vs. Wellsboro' and Tioga Plank-Road Co., 35 Pa., 152 (1860).
Commonwealth vs. Baxter, 35 Pa., 263 (1860).
Horner vs. Hasbrouck, 41 Pa., 169 (1862).
Commonwealth vs. Leech, 44 Pa., 332 (1863).
Rhines vs. Clark, 51 Pa., 96 (1865).
Ensworth vs. Commonwealth, 52 Pa., 320 (1866).
Cumberland Valley R. R. Co. vs. McLanahan, 59 Pa., 23 (1868).
Western Pennsylvania R. R. Co. vs. Johnston, 59 Pa., 290 (1868).
Spangler's Appeal, 64 Pa., 387 (1870).
Arna's Appeal, 65 Pa., 72 (1870).
Koch vs. Williamsport Water Co., 65 Pa., 288 (1870).
Mussleman's Appeal, 65 Pa., 480 (1870).
Gourley vs. Kinley, 66 Pa., 270 (1870).
Fehr vs. Schuylkill Navigation Co., 69 Pa., 161 (1871).
Fretton vs. Karcher, 77 Pa., 423 (1875).
Pierce vs. Livingston, 80 Pa., 99 (1875).
Ahl vs. Rhoads, 84 Pa., 319 (1877).
Hare vs. Commonwealth, 92 Pa., 141 (1879).
Phelps's Appeal, 98 Pa., 546 (1881).
Beltzhoover vs. Gollings, 101 Pa., 293 (1882).
White vs. Borough of McKeesport, 101 Pa., 394 (1882).
Campbell vs. Grooms, 101 Pa., 481 (1882).
Warren vs. Steer, 118 Pa., 529 (1888).

Appeal of Meurer, 119 Pa., 115 (1888).
Appeal of Brotzman, 119 Pa., 645 (1888).
Power vs. Borough of Ridgway, 149 Pa., 317 (1892).
Phillips vs. St. Clair Incline Plane Co., 153 Pa., 230 (1893).
Mack vs. Wright, 180 Pa., 472 (1897).
Estate of Petterson, 195 Pa., 78 (1900).
Robinson vs. Norwood Borough, 215 Pa., 375 (1906).
Hawkins vs. Pittsburgh, 220 Pa., 7 (1908).
Deer vs. Sheraden Borough, 220 Pa., 307 (1908).
Frick Coke Co. vs. Mt. Pleasant Township, 222 Pa., 451 (1909).
Westervelt vs. Dives, 231 Pa., 548 (1911).
Lewisburg Bridge Co. vs. County of Union, 232 Pa., 255 (1911).
Curran vs. Delano, 235 Pa., 478 (1912).
Geesey vs. City of York, 254 Pa., 397 (1916).
McKee vs. Pittsburg, 7 Pa. Superior Ct., 397 (1898).
Curran vs. East Pittsburg Borough, 20 Pa. Superior Ct., 590 (1902).
Cooper vs. Scranton City, 21 Pa. Superior Ct., 17 (1902).
Herr vs. Altoona, 31 Pa. Superior Ct., 375 (1906).
Maurer vs. Brennan, 58 Pa. Superior Ct., 587 (1914).

Office Supreme Court, U. S.
FILED
OCT 6 1919
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 128 OCTOBER TERM, 1919.

OHIO VALLEY WATER COMPANY, Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, Defendants in Error.

Brief of Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough and William B. Dawson, Defendants in Error.

DAVID L. STARR,
ALBERT G. LIDDELL,
LEONARD K. GUILER,
Attorneys for Defendants in Error.

James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

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Brief of Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough and William B. Dawson, Defendants in Error.

Statement of the Case.

The Pennsylvania Public Service Company Law went into effect January 1st, 1914. On December 30th, 1913, the plaintiff in error, as required by said law, filed a Schedule of Rates with the Commission to become effective January 1st, 1914.

These rates were greatly in excess of the prior rates

charged, and as to one of the boroughs were double the former rate. Litigation before the Courts and the Commission has enabled the plaintiff in error to continue to collect from its consumers in accordance with the Schedule filed December 30th, 1913, despite the determination by the Commission on February 12th, 1917, that said rates were unjust and unreasonable (R., Vol. I, page 40). Upon complaint of the defendants in error (excluding the Public Service Commission) the case was heard by the Commission, which filed a report, and subsequently upon petition of the plaintiff in error for a rehearing, the Commission made certain modifications in its former report (R., Vol. I, page 53) and issued a formal order carrying its rulings into effect. From this report and order of the Commission the plaintiff in error appealed to the Superior Court of Pennsylvania, as provided by the Pennsylvania Public Service Company Law. After argument the Superior Court handed down a decision in which it differed with the Commission in five different items of value, entering into the fair value of the property of the plaintiff in error, as to all of which there was conflicting testimony, and reversed the order of the Commission and directed it to reform its valuation in accordance with the Superior Court's opinion, and upon such valuation to fix a schedule of rates which should cover the expenses, depreciation, etc., and the return per cent. as found by the Commission to be fair (R., Vol. I, page 106).

From this decree of the Superior Court the defendants in error appealed to the Supreme Court of Pennsylvania, which court after argument and consideration of the case reversed the decree of the Superior Court and

reinstated the order of the Commission (R., Vol. I, page 111).

From this decree of the Supreme Court of Pennsylvania the plaintiff in error has now appealed to this court, alleging that the decree of the Supreme Court of Pennsylvania has deprived it of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and praying "that the said judgment of the Supreme Court of the State of Pennsylvania be reversed and that the said order of the Superior Court of Pennsylvania be reinstated and for costs" (R., Vol. I, page 139).

It is denied, as alleged in the Statement of the Case by plaintiff in error (page 12) that the Supreme Court of Pennsylvania, in its decision, ignored the real question in the case, and it is further denied that said court "held that the Water Company had no right to a judicial review of the question whether its property was confiscated in violation of the Fourteenth Amendment" (page 12).

On the contrary, a judicial review was exactly what the plaintiff in error had in the Supreme Court of Pennsylvania, and this appeal is an attempt to obtain another in this court.

ARGUMENT.

CONTENTION OF DEFENDANTS IN ERROR.

We contend that the fair value of the property of the plaintiff in error, as found by the Commission, was judicially determined by the Supreme Court of Pennsylvania to be supported by the evidence, and that the Commission's order was reasonable and in conformity with law.

Counsel for plaintiff in error have divided their argument into ten headings, which for convenience we shall follow.

HEADING I (Page 43).

I. (1) ADDITIONAL PROVISIONS OF THE PENNSYLVANIA PUBLIC SERVICE COMPANY LAW, RELATIVE TO THE POWERS OF THE COMMISSION.

(1) Counsel for plaintiff in error have failed to quote Article V, Sect. 20 (a), of the Public Service Company Law of Pennsylvania, 1913, pages 1415-1416 (*Purdon's Digest,* 13th ed., Vol. 6, p. 7228), relative to the powers of the Public Service Commission, which section provides as follows:

> "Section 20 (a). The commission *shall have power,* upon application or upon its own motion, to *ascertain* and *determine* the fair value of the property of every public service company in this Commonwealth, and to *determine* any matter in connec-

tion therewith; and shall exercise the said power whenever the same is required, or whenever *it shall deem* such valuation or determination necessary or proper under any of the provisions of this act.

In ascertaining and determining such fair value the commission *may determine every fact, matter,* or *thing, which* in *its judgment,* does or may have any bearing on such value; and *may* take into consideration, among other things, the original cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance, or other municipal contract, or fixed or proposed by the commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property and labor, and the developmental and going concern value of such public service company; and these, and any other elements of value, *shall be given such weight* by the commission as may be just and right in each case." (The italics are ours.)

Counsel for plaintiff in error assert (p. 50) that the plain purpose of the amendment to the Public Service Company law, relative to appeals to the Supreme Court from the Superior Court, "was to limit the right of appeal from the decisions of the Superior Court."

As a matter of fact, the plain purpose was to place appeals in Public Service cases exactly upon the same

ground as all other appeals to the Supreme Court from the Superior Court, as provided by Sect. 9 of the Act of June 24th, 1895, which established the Superior Court (*Pamphlet Laws,* 212, p. 220; *Purdon's Digest,* Vol. 4, p. 4507).

In any event the plaintiff in error was not affected by any limitation of the right of appeal, for the Supreme Court granted an appeal in this case.

1. (2) THE PUBLIC SERVICE COMMISSION IS AN ADMINISTRATIVE BODY.

(2) We admit that the Public Service Commission of Pennsylvania is an administrative body with power (as provided in the above quoted section of the Public Service Company law) "to ascertain and determine the fair value of the property of every public service company and to determine any matter in connection therewith."

If in the exercise of some of its powers it might be termed by a New Jersey court "a public prosecutor," because it may begin proceedings on its own motion, the fact remains that it was not so acting in this case, which was instituted by the Boroughs of Ben Avon, McKees Rocks, Bellevue, Avalon and West View, the Township of Stowe, and William B. Dawson, on behalf of all the consumers of water of the plaintiff in error.

HEADING II (Page 52).

II. THE REINSTATEMENT BY THE SUPREME COURT OF THE ORDER OF THE PUBLIC SERVICE COMMISSION WAS A FINDING BY THE SUPREME COURT OF EVERY FACT CONTAINED IN THE REPORT OF THE COMMISSION.

THE PENNSYLVANIA SUPREME COURT DID NOT HOLD THAT "THE FINDINGS OF FACT OF THE COMMISSION MUST BE UPHELD IF SUPPORTED BY SUBSTANTIAL EVIDENCE, NOTWITHSTANDING BY THE WEIGHT OF THE EVIDENCE THE SUPERIOR COURT HAD REACHED A DIFFERENT CONCLUSION."

THE QUESTION OF THE POWERS OF THE SUPERIOR COURT ON AN APPEAL FROM AN ORDER OF THE COMMISSION HAS NOTHING TO DO WITH THIS CASE.

Under this heading counsel for plaintiff in error assert that the Supreme Court of Pennsylvania made no findings of fact itself nor intimated that the findings of the Superior Court were incorrect (p. 52).

The reinstatement by the Supreme Court of the order of the Public Service Commission was a finding by the Supreme Court of every fact contained in its report.

It requires no citation of authority to establish the above contention.

Counsel for plaintiff in error concede this in their own argument relative to the 7 per cent. rate of return found by the Commission to be fair.

In their Statement of the Case (p. 11) they say:

> "This case differs from every other rate case which has been before this court because in this case the court has the benefit of a finding which specifies the rate per cent. which the Water Company is entitled to receive on the value of its property.
>
> The Commission's finding as to this rate per cent. of return to which the company is entitled was affirmed by both the Superior Court and the Supreme Court of Pennsylvania. This *finding* as to the rate per cent. of return, we submit, is one of the *settled points* in this case." * * *

And again in their argument (p. 283), being yet fearful of losing this valuable fact found in their favor by the Supreme Court, they say:

> "The Supreme Court of Pennsylvania reinstated the Commission's order in its entirety, which, of course, *includes* the 7 per cent. rate of return,"

and three pages are devoted to an argument on why this finding should not be disturbed by this Court.

If the reinstatement of the Commission's order by the Supreme Court was a finding of one fact by that court and became a "settled point," it follows that such reinstatement was a finding by that court of *all facts therein contained,* and the admission that one fact was so found surrenders the point.

The Supreme Court having found its own facts, there was no occasion for any action upon the alleged facts found by the Superior Court. By its action in reinstating the order of the Commission it might be considered to have at least "intimated" that the findings of the Superior Court were incorrect.

On page 54 of their argument counsel for plaintiff in error cite the alleged action of the Supreme Court upon the value of the Neville Island property of the Water Company as indicative of the so-called "doctrine" of that Court.

This is done by the simple process of lifting one sentence out of the opinion of the Supreme Court and quoting it apart from its context.

To quote from their argument (p. 54):

> "The doctrine laid down by the Pennsylvania Supreme Court in this case is strikingly shown by its consideration of the question raised as to the value of the Neville Island property of the Water Company. Upon that point the court, after commenting on the evidence of Messrs. Hice and Leaf, experts called by the defendants in error, making this statement (R., Vol. I, p. 117):
>
> > 'If the Commission credited the testimony of this nature which was presented it would beyond question have been warranted in finding from the evidence, that the sand bar upon which the Water Company located its wells had no special value as a source of water supply over other land in the vicinity.'
>
> "It should be noted in this connection that the court does not comment upon the evidence of the

witnesses of the plaintiff in error, but distinctly announces that if the Commission credited the testimony of the witnesses of the defendants in error it would have been warranted in the conclusion reached by the Commission as to the value of this portion of the property."

Such distortion of the facts, even though unintentional, should not be permitted to go unchallenged. What the Supreme Court actually did was to devote two and one-half pages of its opinion in the State Report to a consideration of the value of the Neville Island property, and the sentence quoted above occurs at the end of that portion of its opinion (R., Vol. I, p. 117).

The Supreme Court said, *inter alia* (R., Vol. I, p. 116):

> "The evidence shows that the land in question was purchased by the Company in 1904 for the sum of $3,900. Witnesses for complainants familiar with land values in that vicinity valued the land for general purposes, and without reference to its particular use as a site for a pumping station, at various sums, averaging about $8,200. The Commission, however, seems to have assented to the contention that some special value attaches to the location as a site for a pumping station, as a source of water supply; and for rate-making purposes it estimated the reproduction cost of the Neville Island property at the sum of $48,800."

The Supreme Court then went on to review the testimony of Hice, the State Geologist, and Leaf, an engineer who had constructed eight or nine water plants for Ohio River towns, both of whom testified that the sand

bar had no special value as a means of production of filtered water. It was in connection with their testimony that the Supreme Court used the language quoted above by counsel for plaintiff in error.

In other words, the Supreme Court said that while the Commission had found that the Neville Island property had a value of $48,800 on account of the Commission's assent to the contention that the sand bar had a special value, yet it would have been warranted in finding a much lower valuation if it had credited the testimony of Messrs. Hice and Leaf.

It is, therefore, a palpable misstatement of the facts to assert that the conclusion reached by the Commission as to the value of the Neville Island property was based upon the testimony of Messrs. Hice and Leaf.

On the contrary, the finding of the Commission was squarely against their testimony, and the Supreme Court did not disturb it.

On page 55 of the argument the question of the construction by the Supreme Court of the powers of the Superior Court is raised, and this question appears again and again in various forms throughout the argument.

It is contended by defendants in error that the question of the powers of the Superior Court on an appeal from an order of the Commission has nothing to do with this case.

It is a matter of no consequence whether the Supreme Court of Pennsylvania has construed the powers

of the Superior Court on an appeal from an order of the Commission to be limited or otherwise.

This appeal is from the *judgment* of the Supreme Court of Pennsylvania. Nowhere is it alleged that there is any provision of the Pennsylvania Public Service law which limits the powers of the Supreme Court of Pennsylvania on an appeal from the Superior Court in a Public Service Company case, such as this.

There is nothing in the opinion of the Supreme Court which admits of any such limitation of its powers.

Under the Pennsylvania Act of June 24th, 1895, Sect. 9, *Pamphlet Laws,* p. 212 (*Purdon's Digest,* 13th ed., Vol. 4, pp. 4518-37), the Supreme Court on an appeal from the Superior Court "*may enter therein such judgment, order or decree as may be just,*" and by Sect. 2 of the Act of July 11th, 1917, *Pamphlet Laws,* p. 808, it is provided that an appeal in a Public Service case from the Superior Court to the Supreme Court "shall be taken and prosecuted in the same manner and with the same effect as is provided in other cases of appeal from the Superior Court to the Supreme Court."

In the exercise of these broad powers the Supreme Court examined the testimony bearing upon the elements of value wherein the Superior Court differed with the Commission, and in each instance it found that the findings of fact by the Commission were based upon competent evidence, were reasonable, that no abuse of discretion had been shown and that they were in no instance arbitrary and not in conformity with law.

HEADING III (Page 61).

III. (1) THE PLAINTIFF IN ERROR HAD A JUDICIAL INVESTIGATION OF ITS CASE IN THE SUPREME COURT OF PENNSYLVANIA.

(2) COMPARISON OF THE JUDICIAL INVESTIGATION WHICH PLAINTIFF IN ERROR CLAIMS TO HAVE HAD OF ITS CASE IN THE SUPERIOR COURT WITH JUDICIAL INVESTIGATION OF THE SAME SUBJECT MATTER IN THE SUPREME COURT.

Plaintiff in error asserts that it has been denied a judicial investigation of the question as to the confiscation of its property.

On page 65 of the argument it is asserted:

> "The Supreme Court reversed the decree of the Superior Court and reinstated the order of the Commission. It did so, not on the ground that the findings of fact made by the Superior Court were incorrect, but on the theory that that court could 'not examine the facts further than to determine whether there was substantial evidence to sustain the order' of the Commission (see opinion of Supreme Court, R., Vol. I, p. 114)."

Reference to Vol. I, page 114, of the Record, shows that the alleged "theory" of the Supreme Court is found in a quotation from the case of *Interstate Commerce Commission vs. Union Pacific Railroad,* 222 U. S., 541, appearing in the opinion of the Supreme Court of Penn-

sylvania, where it is citing general principles relative to Public Service Company cases.

The Supreme Court reversed the Superior Court not upon the "theory" alleged above but because, after examining the evidence, it found as to the Neville Island property that:

> (1) "It does not appear that any element properly entering into the value of the Neville Island property was overlooked by the Commission, or that its finding in this respect was unreasonable or was based on incompetent evidence, and we can see no sound reason for interfering with its judgment in this respect." (R., Vol. I, p. 118.)

(2) As to the parallel lines of the Monongahela Water Company, it reversed the Superior Court because:

> "The testimony shows that the purchase of these lines was made for the purpose of getting rid of business competition rather than to increase the service capacity of the purchaser. The determination of what was necessary and what was over-development under the circumstances was clearly within the proper function of the Commission, and where, as here, the finding is sustained by competent evidence, and no abuse of discretion is shown, the finding should not be disturbed by the Court on review." (R., Vol. I, p. 118.)

(3) As to Going Concern Value, it reversed the Superior Court because:

> "We do not find from the record that the Commission, in estimating the fair value of the property, failed to take into consideration the element of value

arising from the fact that the plant of the company is that of a going concern with an established business." (R., Vol. I, p. 120.)

(4) As to Interest During Construction, the Supreme Court reversed the Superior Court because it was unable to "say that the conclusion reached by the Com mission in this respect was unreasonable or that it was not in conformity with law." (R., Vol. I, p. 120.)

(5) As to Brokerage, the Supreme Court reversed the Superior Court because "there was no evidence that the company had ever paid any brokerage." (R., Vol. I, p. 120.)

From the foregoing it will be seen that the plaintiff in error had a judicial hearing upon each and every question and that the Supreme Court did not confine itself to the "theory" as to whether "there was substantial evidence to support the order," as alleged.

(A) (Page 67.) It is admitted the order of the Public Service Commission in this case was a legislative act.

(B) (Page 84.) It is admitted that the question of confiscation of property, under the Fourteenth Amendment, is a judicial question.

(C) (Page 115.) Counsel for plaintiff in error assert:

"The only court of the state to which recourse could be had in the first instance was the Superior Court, to which an 'appeal' was duly taken in this case. That court considered the question of deprivation of property without due process of law on the

> merits, and directed the Commission to reform its valuation of the Company's property. But the Supreme Court, on appeal, held that this was a usurpation of legislative functions, and that the statute did not permit the court to 'examine the facts further than to determine whether there was substantial evidence to sustain the order.' The Supreme Court then examined the testimony, and being of the opinion that the evidence against the Water Company before the Commision was sufficient, if believed, to sustain the Commission's order, gave no consideration whatever to the evidence on behalf of the Water Company (see its opinion, R., Vol. I, pp. 116-121), but reversed the order of the Superior Court and reinstated the order of the Commission."

We have already pointed out (*ante*, p 11) that the construction by the Supreme Court of Pennsylvania of the powers of the Superior Court is not a question in this case.

The assertion of counsel (p. 115) that "The Supreme Court examined the testimony, and being of the opinion that the evidence against the Water Company before the Commission was sufficient, if believed, to sustain the Commission's order, gave no consideration whatever to the evidence on behalf of the Water Company," is but a repetition of what they had already said on page 54 of their argument and is sufficiently answered in our argument on page 14, *ante*.

The repetition of this assertion here can only be excused by the assumption that having mistakenly asserted it once they later believed it to be true.

Reference to the record cited by counsel (R., Vol. I, pp. 116-121) in support of this assertion will show that the Supreme Court expressed no such opinion; neither did it refuse to consider the evidence of the plaintiff in error.

Having stated this false premise, counsel for plaintiff in error devote pages 116 to 151 of their argument in an endeavor to show that such alleged action of the Supreme Court was contrary to the decisions of this Court and the courts of other states.

On page 117 of their argument objection is again made to the construction of the powers of the Superior Court by the Supreme Court, and still again on page 127, complaint is made because the Supreme Court deprived the Superior Court of "the freedom which it would have under a bill in chancery."

On page 150 they return to the subject once more and assert "The Pennsylvania Supreme Court by its construction of the statute, denied due effect to the judicial action of the Superior Court." * * *

Again we ask, this being an appeal from the Supreme Court of Pennsylvania which judicially determined the case on the evidence, what bearing has that court's construction of the powers of the Superior Court on the case at bar?

(D) (Page 158.) We not only assent to the argument of counsel for plaintiff in error (pp. 158-166) that it is the duty of the courts of Pennsylvania to uphold the Fourteenth Amendment to the Constitution of the

United States, but assert further that it is their sworn duty to uphold the entire Constitution.

(E) (Page 166.) From all the foregoing counsel for plaintiff in error submit:

(a) That the order of the Public Service Commission in this case, fixing all the rates of the plaintiff in error, was purely a legislative act.

This we admit.

(b) That the plaintiff in error was entitled to a judicial inquiry into the question whether this legislative act amounted to a confiscation of its property.

This we admit.

(c) We deny "that the plaintiff in error was denied such a judicial inquiry in the State courts by the construction given to the Public Service law."

As we have heretofore shown, there is nothing in the Public Service Law of Pennsylvania imposing any restrictions upon the Supreme Court of that state on an appeal from the Superior Court.

The Supreme Court had the power to enter "such judgment, order or decree as may be just." That court reviewed the testimony; that court determined the facts, and it is from the judgment of that court this appeal is taken.

Counsel for plaintiff in error assert (p. 167) that there was a "judicial investigation" in the Superior Court. This being so, it is evident that even if the

Superior Court had all the powers for which they so earnestly contend in this case, it could not have given so complete a judicial investigation as was given by the Supreme Court under its broad powers on appeal.

A conception of what the plaintiff in error considers a "judicial investigation" may be gathered from an examination of the opinion of the Superior Court. Turning to that opinion, written by Judge Kephart, we find (R., Vol. I, p. 98) the following:

> "We do not *feel* that the Commission committed any error in the value fixed for the Bellevue and Stowe Township reservoirs."

On the question of the value of the Neville Island property, Judge Kephart, after reviewing the *contentions* of the parties (R., Vol. I, pp. 98-99), concludes (p. 100):

> "The property should not be considered in the light in which the appellees' witnesses place it for building or manufacturing purposes. It is not entitled to the measure of value fixed by the appellant, that is, what it would cost to reproduce the supply of water if it were taken away. Between the extremes of the evidence introduced there is a fair value. While it might be difficult to determine, nevertheless, confiscation cannot be permitted because of difficulties. The Commissioner who heard the testimony fixed it at $100,000. He possibly was in a better position to judge than anyone. The Commission's value of $48,800 did not consider all the elements that tended to make up the value of this property. It is directed that the value be increased as indicated by this opinion."

It will be noted that the "judicial investigation" made by the Superior Court did not result in the Court being able to determine the value of this property; but the value of the property as found by the Commission was directed to be increased from $48,800 to $100,000, because the Commisioner who heard the testimony had fixed the value at $100,000, and the Court thought he was better able to judge than any one.

It is evident, therefore, that another element of a "judicial investigation" from the point of view of the plaintiff in error is, that the appellate court should adopt the amount fixed by the Commissioner who heard the testimony as against the findings of the Commission, he being able to judge better than the Court and the Commission.

Certainly the plaintiff in error had a judicial investigation in the Supreme Court on this subject which would stand the above test and more. (See opinion of Supreme Court, R., Vol. I, p. 116.)

On the question of the value of the parallel lines the Superior Court held (R., Vol. I, pp. 100-101) that the Water Company should be allowed the full reproduction cost, new, and ignored and overruled the finding of the Commission that these lines were useful in the public service only to the extent of one-third of their capacity.

Upon appeal the Supreme Court held (R., Vol. I, p. 118):

> "The extent to which these lines were useful for the public service, and the value of the lines, were clearly questions of fact which were peculiarly within the jurisdiction of the Commission to determine. The testimony shows that the purchase of these lines

was made for the purpose of getting rid of business competition rather than to increase the service capacity of the purchaser. The determination of what was necessary and what was over-development under the circumstances, was clearly within the proper function of the Commission." * * *

It will be noted that the Superior Court in its judicial investigation of the parallel lines made no finding of fact that these lines were useful in their entirety in the public service; neither did it find that the decision of the Commission that they were useful to one-third of the capacity was error. But the Supreme Court did find that the decision of the Commission was "sustained by competent evidence." Comparing the action of the Superior and Supreme Court on this element of value, how can it be argued that there was a judicial investigation in the Superior Court and none in the Supreme Court?

As to the item of Going Concern Value, the Superior Court held (R., Vol. I, p. 103):

> "The lowest item fixed by appellant's (plaintiff in error) evidence would not be an excessive value for this item."

The Supreme Court said (R., Vol. I, p. 120):

> "We do not find from the record that the Commission in estimating the fair value of the property failed to take into consideration the element of value arising from the fact that the plant of the company is that of a going concern, with an established business."

Again, it will be noted that the Superior Court did not find as a fact what amount should be allowed for this

item. Its judicial investigation resulted in nothing more than a statement by the Court of what "would *not* be an excessive value for this item," and that was the lowest item fixed by the evidence of the plaintiff in error.

And yet this is termed by the plaintiff in error a "judicial investigation."

As to Interest During Construction, the Superior Court held (R., Vol. I, p. 104):

> "Those who have practical knowledge as to the time necessary to construct a plant of the magnitude of the one under consideration are properly qualified, and perhaps in a better position to determine the time, than lawyers or judges without practical experience. The engineers agreed that two and one-half years was a reasonable time, and this agreement should have been accepted, unless the Commission had other information or other evidence from which to curtail that time. The appellant was entitled to the additional year's interest at the rate found by the Commission."

The Supreme Court said to this item (R., Vol. I, p. 120):

> "From the evidence before it, the Commission concluded that an allowance of interest for a period of one and one-half years would be sufficient. This was a matter of judgment to be exercised upon consideration of the facts. The plant was built to serve a number of communities, and would naturally be ready for use in part, at different periods of time. Under proper management the plant would be earning money on some of its divisions long before they were all entirely completed. We cannot say that the

conclusion reached by the Commission in this respect was unreasonable, or that it was not in conformity with law."

In the judgment of the Superior Court the decision of such a matter should be left to those who "have practical knowledge" rather than to "lawyers or judges without practical experience."

It is manifest the Superior Court did not decide this matter at all; it simply accepted the agreement of the engineers and reversed the finding of the Commission upon whom the law had cast the burden of deciding the matter. And this the plaintiff in error terms a judicial investigation.

The Supreme Court accepted the burden of deciding the matter and affirmed the finding of the Commission. And this the plaintiff in error says was not a judicial investigation.

As to Brokerage, the Superior Court said (R., Vol. I, p. 105):

"The appellant should be allowed a certain per cent. for brokerage, or discount. There was sufficient evidence before the Commission to determine the fair amount, and while the company, in undertaking to allow exorbitant amounts, fell into error, and such issues were clearly unreasonable and grossly in excess of any fair demand, still we cannot deny to the innocent stock and bond holder the justice of securing a reasonable allowance for brokerage as a capital charge. In so doing we do not give any consideration whatever to inflated or fictitious values; the evidence before the Commission was that

seven and one-half per cent. of the reproduction cost would be a fair amount. When based on reproduction cost, the discount is limited to actual value and no fictitious charge is allowed, as it would be if calculated on an issue of stocks and bonds where the utility was created solely from the money received from the sale of bonds. This for a new concern does not seem unreasonable."

The Supreme Court said (R., Vol. I, p. 120):

"No allowance was made for that item of expense, for the reason that there was no evidence that the company ever paid any brokerage. The bonds issued by the company went out in great part, directly in exchange for various properties as they were taken over, and, as the Commission has found, were issued in excess of the real value of the properties taken over. A very wholesome provision of the present law places the issue of securities by a Public Service Company under the supervision of the Commission, and requires its certificate of valuation. In the present case the company makes no claim that it ever actually paid any brokerage for the sale of its bonds." * * *

It will be noted that the Superior Court says that the evidence before the Commission was that seven and one-half per cent. of the reproduction cost *would be* a fair amount. True, there was no evidence that any brokerage had been paid, but in the opinion of the Court the Water Company should be allowed a certain per cent., and this would be fair, whereas the Supreme Court found that there was no evidence that any brokerage had been paid.

It is submitted to this Court that the admission of the plaintiff in error that it had a judicial investigation in the Superior Court answers its contention that it had no judicial investigation in the Supreme Court.

Comparison of the two opinions leaves no escape from the conclusion.

The foregoing analysis of the opinions of the Supreme and Superior Courts has not only illustrated what the plaintiff in error considers a judicial investigation, but also sets forth in detail what the plaintiff in error would have this Court do.

In line with their prayer for reversal (R., Vol. I, p. 139), counsel for plaintiff in error submit to this Court what they consider a proper decree. On page 168 of their argument we read:

> "We submit, therefore, that the proper decree to be made by this Court is *that the decree of the Supreme Court of Pennsylvania be reversed and the decree of the Superior Court be reinstated, all costs in the case to be paid by the defendants in error.* By such a decree only, we maintain, can the benefit of the judicial review in the State Court of first instance, to which the plaintiff in error was constitutionally entitled, be restored to it." (The italics are *theirs.*)

Asserting again and again in their argument that the Supreme Court of Pennsylvania made no findings of fact (pp. 12, 35, 40, 52, 168, 288), with equal ardor it is contended by counsel for plaintiff in error that the "*finding* as to the rate per cent. of return is one of the *settled* points in the case" (p. 11), because the Supreme

Court reinstated the Commission's order (p. 283; *ante*, p. 8).

Mindful of the decision of this Court in *Willcox et al. vs. Consolidated Gas Company*, 212 U. S., 19, in which it was decided that six per cent. was an adequate return, they ask this Court not to disturb the finding of the Commission and the Supreme Court, that seven per cent. is a proper return in this case. On all other points they would have this Court reverse the Supreme Court. They ask one thing more: That this Court reinstate the decree of the Superior Court.

They would have this Court sit in judgment on all questions of fact wherein the Superior Court and Supreme Court disagree.

If, as determined by this Court in *Twining vs. New Jersey* (211 U. S., 78), the meaning of due process of law is to be "ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise," the plaintiff in error has cited no case in which this Court has so acted on a question of fact between a Superior and Supreme Court of a State.

Such an innovation would doubtless be welcomed by every party dissatisfied with the decision of the Court of last resort of a State in a Public Service Company case, but until this Court takes such jurisdiction it will be assumed that it will only "enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied—whether there was such a want of hearing or such arbitrary or capricious actions on the part of the Commission as to violate the due process clause of the Constitution." (*People Ex Rel. N. Y. & Q. Gas Co. vs. McCall*, 245 U. S., 345; 62 Law ed., 337).

HEADING IV (Page 209).

SUBDIVISION (1) (Page 210).

IV. (1) THE AMOUNT DETERMINED BY THE COMMISSION FOR INTEREST DURING CONSTRUCTION WAS IN ACCORDANCE WITH THE EVIDENCE.

It is asserted by counsel for plaintiff in error that the Commission erred in not allowing a sufficient amount for interest during construction.

Reference is made in their argument (p. 212) to a note upon Exhibit R (R., Vol. II, p. 1113) as proof that the engineers of both plaintiff and defendants in error agreed that the construction period would be two and one-half years.

In this "note" it is stated: "Interest during construction has been computed as per Engineers' Agreement, Construction Period being taken at two and one-half years for lands, and two years and less for plant."

Exhibit "R" is a revised summary by Chester & Fleming, engineers, who testified on behalf of the plaintiff in error.

As a matter of fact, the only agreement of the engineers of both parties on this subject was that in the case of *real estate* whatever value was fixed for same there should be added 15 per cent. for interest during construction (R., Vol. II, p. 989).

This agreement of the engineers was based upon *reproduction value* alone, and, of course, was merely an element to aid the Commission in arriving at a true valuation.

It is true that in the "Final Summary" attached to the engineers' agreement (R., Vol. II, pp. 998-1000, Exhibit 20) the engineers for both parties allowed six per cent. on the items covering reservoirs, standpipe, water supply, etc., and three per cent. on the buildings, machinery, equipment, etc.

Bearing in mind that this was merely an arbitrary fixing of the time of construction based upon an estimate of the engineers, the conclusion is inevitable that after the purchase of the real estate no business was done for two and one-half years; after the completion of the reservoirs, standpipe, water supply, transmission system, etc., no business was done for one year, and after the completion of the buildings, machinery, equipment, etc., no business was done for six months.

The Superior Court said in its opinion (R., Vol. I, p. 104) that the agreement of the engineers was that two and one-half years was a reasonable time to construct a *plant* of the magnitude of the one under consideration, and therefore plaintiff in error was entitled to an additional year's interest.

As we have shown above, the engineers, did not agree it would take two and one-half years to *construct the plant*. They simply agreed to allow six per cent. on the value of the *real estate* for two and one-half years, one year on the water supply, etc., and six months on the buildings and machinery.

The allowance by the Superior Court of another year's interest on the *real estate* and *entire plant* and *equipment* of the plaintiff in error is, therefore, not in accordance with the engineers' agreement at all and has no testimony to support it.

The Superior Court speaks of the *construction* of the *plant*. But as to part of the *plant* the engineers allowed a construction period of one year, and as to the balance six months.

The Commission was, therefore, in exact accord with the evidence when it fixed a construction period of one and one-half years, considering that part of the plant would be in service before the entire plant was completed.

HEADING IV (Page 209).

SUBDIVISION (2) (Page 216).

IV. (2) THE COMMISSION ALLOWED GOING VALUE.

We do not dispute the proposition that there is an element of value in an assembled and established plant, doing business and earning money which is a property right to be considered in determining the fair value for rate-making purposes.

As to Going Concern cost or value, the Superior Court held (R., Vol. I, p. 103) that "the lowest amount fixed by the appellant's (plaintiff in error) evidence would not be an excessive value for this item."

Counsel for plaintiff in error state (p. 245) that "the lowest amount of going value fixed by the evidence

of the Water Company was $185,000, testified to by Mr. Knowles" (R., Vol. II, p. 846).

This Court is asked to allow this item by reinstating the order of the Superior Court.

Mr. Knowles' conception of going cost or value, therefore, becomes a vital factor in this case.

Turning to his testimony (R., Vol. II, p. 845), we find the following:

"Q. Now, what is the difference, if there is any, between going value and the cost of established business?

A. The going cost is an element to be used when using the measuring stick of the cost of reproduction new, and is the cost of the created income. The cost of established business is a proper element to use, when considering historical cost, and is a measure of the sum of the annual deficits.

Q. Is that called the Wisconsin method?

A. That is a method that has beeen used by the Commission in Wisconsin, and frequently and commonly goes under that name, yes.

Q. Have you endeavored to reach a figure which, in your judgment, is the going cost of this company's property?

A. Yes.

Q. What is that figure?

A. $185,000."

On cross-examination he testified as follows (R., Vol. II, p. 851):

"Q. Now, coming down to your going value, you fig-

ured that out by what is known as the Wisconsin method, did you?

A. No. The going cost was figured out upon the basis of the cost of the created income, which is not the Wisconsin method.

Q. Well, did you include in that the cost of established business?

A. No. The cost of established business is another thing entirely, Mr. Starr. That was used in the historical basis of cost, and that is the sum of the accumulated deficits. They are two very different things and should not be used together or confounded."

Further in cross-examination, he testified (R., Vol. II, p. 853):

"Q. Mr. Knowles, do you believe that it is proper to create a going value upon a plant where the public, by its payments to that company, has created that value, and especially when that company has a monopoly?

A. Well, in the first place, *going cost can only exist where there is a monopoly. It never could exist without a monopoly.* And in the second place, whatever may have happened in the cost is a matter of history, and therefore enters into that sort of a calculation, and has nothing to do with cost of reproduction new. And you must consider under cost of reproduction new, the cost of creating the income, just as much as you should consider cost of the physical property. Now, what bearing that will have upon fair value is another and entirely different question."

Since counsel for plaintiff in error assert (p. 286) that "the company *has no monopoly* or exclusive franchise," under the laws of Pennsylvania, we might leave the question right here, assuming that Mr. Knowles' testimony was based upon the assumption that the company had a monopoly. *As it is admitted that it has no monopoly, under the testimony of Mr. Knowles Going Cost does not exist in this case.*

This Court is asked to affirm an opinion of this witness that the sum of $185,000 is a proper amount to be allowed for Going Cost when the evidence shows that the opinion is based upon an assumption of fact that does not exist.

Evidently the Superior Court subsequently decided that the testimony of Mr. Knowles on Going Cost might not have been sufficient to justify a finding that $185,000 be allowed, for in the Beaver Valley Water Company case (Brief of plaintiff in error, p. 342) the Court said, relative to Going Cost in the case at bar:

> "The record returned would have required a value for this item, determined by the testimony then before the Commission, or *from such other testimony it desired to secure.*"

In other words, the Superior Court first ordered the Commission to find a Going Cost of $185,000 on the testimony of Mr Knowles that such was a proper amount.

Subsequently the Court said that what it actually meant was that if the testimony of Mr. Knowles was not sufficient the *Commission should secure the testimony.*

It is reasonable to suppose that the plaintiff in error produced all the testimony on the subject that could be obtained.

It certainly seems unusual to place the burden of securing additional testimony upon the Commission, especially as there was nothing in the opinion of the Superior Court in the case at bar to indicate that such was the Court's view of its duty.

The Commission in its report (R., Vol. I, p. 67) gave a full discussion to Going Value so far as it applied to Reproduction Cost, new.

The Commission found that the original cost of construction, or the actual cost of the properties, to be $841,343, which after deducting accrued depreciation gave a present value by that method of $783,194 (R., Vol. I, p. 69).

The Commission found the Fair Value for rate-making purposes used and useful in the public service to be $924,744 (R., Vol. I, p. 71).

The fixing of the value of $141,550 in excess of the original cost of this property must have come from somewhere, and while it is made up of increases in various items over and above the original cost, it is nothing more nor less than the distribution of "Going Cost," allowed according to the ruling of this Court in *Des Moines Gas Co. vs. City of Des Moines,* 238 U. S., 153 (p. 165).

Counsel for plaintiff in error assert (p. 244) that the Water Company and its predecessors have only paid dividends amounting to $35,206.65, therefore there is no

room for application of the principle that the company might have been compensated for Going Value in the high rates charged, as decided by this Court in the Des Moines case, above.

They also say "the *old* rates were inadequate." But no mention is made of the fact that since January 1, 1914, the Water Company has been and still is collecting new rates which the Commission found to be excessive and unjust. We have only to turn to the statement of this case in their Brief (p. 5) to learn that these excessive rates yielded the Water Company a gross income of $162,249.82 in the year 1914. We assume they have not been less and probably have been much more each subsequent year.

Of the above mentioned dividends, $10,089.90 were paid by the Ohio Valley Water Company and yet in the analysis of its financial history based upon actual plant cost as shown by its books (Exhibit 24, R., Vol. II, p. 1008) it was allowed an income of 6 per cent., although every dollar invested in it with the exception of $30,000.00 was money for which 5 per cent. bonds had been issued.

Counsel for plaintiff in error characterize as "imaginary and preposterous" the surplus shown by above Exhibit 24, amounting to $152,783.96.

It is not based on any other value than the actual cash, invested in the plant. Objection is made by counsel for plaintiff in error that nothing is allowed for the purchase of the Monongahela Water Company stock This was the stock on which Henry P. Haas had taken an option for $63,616.00, less a commission of 5 per

cent., and immediately sold to the plaintiff in error for $292,450.00 (R., Vol. I, p. 55).

If the Water Company does not have this surplus which after deduction of the dividends paid, viz., $10,089.90 leaves $142,694.06, it is but reasonable to suppose that it went into extentions and is included in the historical cost of $841,343.00. The Secretary of the Company admitted that extensions were made out of earnings, but was unable to state the amount (R., Vol. I, p. 184).

Adding this excess of income of $142,694.06, collected from the consumer to the $83,401.00 allowed by the Commission over and above the cost of the Water Company's property, the consumer is compelled to pay 7 per cent. on $126,095.06 annually, to the Water Company on an investment it never made, but which the Commission included in fair value.

And yet it is argued the Commission did not consider Going Value.

Any going value other than allowed by the Commission, is neutralized and compensated for by these surplus earnings in the past of $152,800, and by the money received by the Company, for the sale of hundreds of thousands of dollars worth of bonds, the money received from which was not invested in plant, but went to the stockholders.

What became of the $369,000 worth of bonds of the Ohio Valley Water Company in excess of the amount of the investment in 1904 at the time of the consolidation?

Three hundred sixty-nine thousand dollars worth of bonds went to the owners of constituent companies

at the time of purchase, over and above the investment in the plants built by these constituent companies, only one of which was operating before its purchase.

The worst instance of this sort was the purchase of the Valley Consolidated Water Company by the Ohio Valley Water Company in 1905. The former Company had an outstanding bond issue of $150,000 on an investment which the accountants found to be somewhere between $243,204.25 and $231,616.94. As consideration for these properties the plaintiff in error issued $450,000.00 of capital stock, $297,000.00 of bonds and assumed the outstanding bond liability of the Valley Consolidated Water Company, amounting to $150,000.00, making a total consideration of $897,000.00 in par value of securities, for property that did not cost over $244,000.00, according to the accountants of the plaintiff in error (R., Vol. I, pp. 71-72).

Again, it is argued by counsel for plaintiff in error (p. 231) that because the fair value of the property as found by the Commission was less than the reproduction cost found, that the Commission did not allow Going Value, because no Going Value was included in the reproduction cost.

Under the Pennsylvania Public Service Company Law the Commission was not bound to find Going Value as a separate item.

Section 20 (a) of the Public Service Company law of 1913 (*ante*, p. 4), empowered the Commission "to ascertain and determine the fair value of the property of every public service corporation" and "in ascertaining and determining such fair value the Commission

may determine every fact, matter, or thing, which, in its judgment, does or may have any bearing on such value; and *may* take into consideration, among other things—the probable *earning* capacity of the property under *particular rates fixed* or *proposed* by the *Commission*—and *going concern value* of such public service corporation; and these and any other elements of value, shall be given such weight by the Commission as *may* be *just* and *right* in each case."

The Commission said it did allow Going Value (R., Vol. I, pp. 70-71). It fixed a rate of return of 7 per cent. annually on the fair value of the Water Company's property.

In ascertaining this fair value it was empowered to take into consideration the 7 per cent. rate of return fixed by it. It is a fair inference that the Commission in ascertaining the fair value, considered the 7 per cent. rate of return allowed by it, on the question of the weight to be given Going Value.

That a 7 per cent. rate of return is high, in a state where the legal rate of interest is 6 per cent., is apparent.

That it is open to question on this ground is indicated by the argument of counsel for plaintiff in error (p. 11) that it is a "settled point in the case," and their extended argument (p. 283) that the Water Company is entitled to a 7 per cent. return because of the "risks and hazards to which it is subjected" (p. 285).

How then can it be successfully argued that the Commission did not allow Going Value, or that there was no place for it in the fair value found by the Commission?

The *weight* to be given it was to be determined by the Commission.

HEADING IV (Page 209).

SUBDIVISION (3) (Page 246).

IV. (3) THE COMMISSION ALLOWED SUFFICIENT VALUE FOR THE NEVILLE ISLAND REAL ESTATE.

Under this heading the value of the Neville Island property is discussed. The Commission allowed the sum of $48,800.00, and the Superior Court directed that the amount be increased to $100,000.00 because in the opinion of Commissioner Rilling it was worth that much.

The testimony on the subject was carefully reviewed by the Supreme Court in its opinion (R., Vol. I, pp. 116-118), and while the Supreme Court was of the opinion that there was a question as to whether the sand bar had any special value as a source of water supply, it did not disturb the finding of the Commission.

The property known as the Neville Island property consists of two acres on Neville Island and seven acres of adjoining low land, the latter consisting of a sand bar situate between the United States harbor line and the low water line of the Ohio River.

The Supreme Court held that the plaintiff in error had only a qualified right to the use of the land between high and low water mark and its occupancy of that portion of the property, which lay below high water mark, in a navigable river, was dependent upon the grace of the Government, and could not justly or properly be

made a basis for capitalization, as against the public (R., Vol. I, p. 118).

Counsel for plaintiff in error cite (p. 250) the case of *City & County of Denver et al. vs. Denver Union Water Company,* 246 U. S., 178, as an authority, to show the Supreme Court of Pennsylvania was in error in holding as above.

An examination of that case shows that the *real estate* of the water company was not in question.

The question was whether the value of the pipes in the streets of Denver was less because the city could order them taken up at any time. There was no question as to the ownership of the pipes. They were the absolute property of the water company. In the case at bar the water company has merely a permissive right to use the sand bar, liable to be terminated at any time by the Secretary of War.

Certainly this is an element to be considered where title is claimed in fee simple.

In this connection attention is called to the argument of counsel for plaintiff in error (p. 284) where they say:

> "On account of the location of its pumping plant and water supply on an island in the Ohio River, the Water Company is exposed to unusual hazards. Both its mains crossing the Ohio River to the North Boroughs were broken at one time through accidents in the year 1915 (Sloane, R., Vol. I, p. 471). By reason of this occurence, the company sustained a loss of approximately $22,000.00. The breaking of these pipes is something that may happen at any time."

On account of the "risks and hazards" to which the Water Company is subjected, they therefore argue the company should have a return of 7 per cent. on the value of its property.

It will be noted that they contend first, for a large special value for this sand bar (despite the fact that the Water Company has only a permissive right to the same) because of its value as a filtering medium and its convenient location; second, they contend for a return of 7 per cent. on the value of the property because of the "risks and hazards" to which the company is subjected on account of the location of its plant on this sand bar in the Ohio River.

A clearer case of playing both ends against the middle cannot be imagined.

The Commission's value of $48,000.00 for these nine acres was at the rate of over $5,000.00 an acre.

When it is considered that seven acres of this tract was a sand bar within the harbor lines which by reason of its location in the Ohio River had put the company to an expense of $22,000.00 in the year 1915, on account of the hazards of the location, the valuation of the Commission was certainly not too low.

HEADING IV (Page 209).

SUBDIVISION (4) (Page 264).

IV. (4) IT WAS FOR THE COMMISSION TO DETERMINE WHAT PORTION OF THE PARALELL LINES OF THE MONONGAHELA WATER COMPANY WERE USED AND USEFUL TO THE PUBLIC SERVICE; A PROPER VALUE WAS PLACED THEREON BY THE COMMISSION.

The Commission found that the parallel lines of the Monongahela Water Company were used and useful to the extent of one-third of their capacity, and therefore allowed one-third of the reproduction cost as fixed by the engineers (R., Vol. I, pp. 64-65).

The Superior Court was of the opinion that the entire reproduction cost of these lines should be allowed, because it was alleged by plaintiff in error that it had a gross revenue of $11,000. per annum from the parallel and non-parallel lines purchased from the Monogahela Water Company (R., Vol. I, pp. 101-102).

Asserting in their argument (p. 267) that *fourteen* (14) additional consumers went on the Monongahela Lines in the year 1915, counsel for plaintiff in error argue that the gross income from all the Monongahela lines of $11,000. per annum is at a greater *rate* than the gross income from the entire property, and that the only cost in operating these lines is the *"extra coal required in pumping the water."*

What proportion of this $11,000. comes from the non-parallel lines is not stated. What it costs to pump the water is likewise not shown. The argument is based on the theory that one portion of the pipe lines of the Water Company may be segregated and the value of the segregated portion may be shown by proving the gross income of the same in water rents leaving out of consideration all operating expenses.

That the opinion of the Superior Court is based on this theory cannot be denied. That such a theory does not prove what portion of the parallel lines are used and useful to the public is beyond question.

It is manifest that the finding of the Superior Court was based upon incompetent evidence and should not be substituted for the finding of the Commission.

The Supreme Court found that "the testimony shows that the purchase of these lines was made for the purpose of getting rid of business competition rather than to increase the service capacity of the purchaser," and that "the determination of what was necessary and what was over-development under the circumstances, was clearly within the proper function of the Commission" (R., Vol. I, p. 118).

HEADING IV (Page 209).

SUBDIVISION (5) (Page 270).

IV. (5) THERE WAS NO EVIDENCE THAT ANY BROKERAGE HAD BEEN PAID.

As to whether discount on brokerage when the same has been actually paid, should be allowed as a capital charge is open to question.

It is admitted by counsel for plaintiff in error (p. 274) that the company could not show by direct evidence the amount of brokerage or discount alleged to have been paid. The only evidence in the case on the subject was the *estimate* of the engineers who agreed that 7½ per cent. was the proper charge, if a charge should be allowed.

The whole argument of counsel for plaintiff in error rests upon this estimate of the engineers. Aside from the question of law as to whether brokerage is a proper capital charge, the Commission was acting within its discretionary powers in refusing to allow it, in the absence of evidence that it had been actually paid.

Upon this question the Superior Court of Pennsylvania said (R., Vol. I, p. 105):

> "The appellant should be allowed a certain per cent. for brokerage, or discount. There was sufficient evidence before the Commission to determine the fair amount and while the company, in undertaking to allow exorbitant amounts, fell into

error, and such issues were clearly unreasonable and grossly in excess of any fair demand, still we cannot deny to the innocent stock and bondholder the justice of securing a reasonable allowance for brokerage as a capital charge. In so doing we do not give any consideration whatever to inflated or fictitious values; the evidence before the Commission was that seven and one-half per cent. of the reproduction cost would be a fair amount. When based on reproduction cost, the discount is limited to actual value and no fictitious charge is allowed as it would be if calculated on an issue of stocks and bonds where the utility was created solely from the money received from the sale of bonds. This for a new concern does not seem unreasonable."

It will be noted that the Superior Court based its opinion entirely upon the estimate of the engineers. What qualifications the engineers had to enable them to form an opinion on brokerage in the sale of bonds years ago, does not appear.

We appreciate the desire of the court to protect the "innocent stock and bondholders," despite the "exorbitant amounts" which the company undertook to allow. But the consumers of the water of this company are equally innocent, and we are at a loss to understand why the court would add the huge sum of $92,415.47 (See Brief of Plaintiff in Error, p. 210) to the value of this company's property, as found by the Commission, upon the mere estimate of engineers and in the absence of any proof that a dollar of this enormous sum had been paid.

Why should the consumers of water of this company give all and the stock and bond-holders be made whole, on an estimate?

The Supreme Court found that no brokerage had been paid, as did the Commission, and it will serve no purpose to argue the question of an estimated brokerage which was not paid.

HEADING V (Page 281).

V. THERE IS NO QUESTION OF CONFISCATION ON THE 7 PER CENT. RATE OF RETURN, AS PLAINTIFF IN ERROR ACCEPTS IT; THE ONLY QUESTION OF CONFISCATION IS ON THE VALUATION, WHICH IS A MATTER OF FACT AND OPINION, AS RULED BY THIS COURT.

Having demonstrated (as they assert) that the valuation of the Commission was too low, and that the value under the opinion of the Superior Court was the proper valuation, counsel for plaintiff in error submit that the return allowed by the Commission is "plain confiscation."

It would be useless to argue this point until it has been determined whether the valuation of the Commission or the Superior Court is to stand, because the argument is based upon a mere assumption which is yet to be decided.

The plaintiff in error "accepts the 7 per cent. rate" (p. 285) fixed by the Commission, therefore there is no question of confiscation on the rate of return.

There remain then on the question of confiscation, the five elements of value wherein the Superior Court differed with the Commission and the Supreme Court.

In the case of *Van Dyke vs. Geary*, 244 U. S., 39 (1917), this court in an opinion by Mr. Justice Brandeis, said (p. 48):

> "The Commission decided that the net return to the owner upon the value of the property employed should be at the rate of at least 10 per cent. after allowing an annual depreciation charge of 3½ per cent. Water rates prescribed on this basis obviously cannot be held confiscatory unless either the valuation placed upon the property used was grossly inadequate or the cost of operation greatly underestimated. These elements are largely matters of fact and opinion, as to which both the Commission and the district court after careful examination found against the appellants. The case is presented to us on contradictory affidavits dealing with the items of value which go to make up the water system. We cannot say 'that it was impossible for a fair minded board to come to the result which was reached.'" (Citing cases.)

If this be the test, or whatever the test, we are confident an examination of the record of the case at bar, will show no confiscation of the property of the plaintiff in error due to the valuation placed thereon by the Commission and the Supreme Court of Pennsylvania.

Counsel for plaintiff in error (p. 284) say we will wholly be unable to induce this court to overturn the finding as to the 7 per cent. rate of return. Recognizing that this court is not acting as an administrative

tribunal, we are not asking that any finding of the Commission and Supreme Court of Pennsylvania be "overturned."

Such is the plea of the plaintiff in error except as to the 7 per cent, rate of return. It is significant that in their contention for more they fear they may get less.

HEADING VI AND HEADING VII.

(Pages 288 and 301.)

VI-VII. THE REINSTATEMENT BY THE SUPREME COURT OF THE ORDER OF THE COMMISSION WAS A FINDING BY THAT COURT OF EVERY FACT THEREIN CONTAINED; THIS COURT WILL DETERMINE HOW FAR IT WILL BE BOUND BY SUCH FACTS FOUND AND WHETHER THERE HAS BEEN CONFISCATION WITHIN THE MEANING OF THE 14TH AMENDMENT.

We have already shown (*ante*, p. 7) that the reinstatement by the Supreme Court of the order of the Commission was a finding by the court of every fact therein contained. This court has so frequently stated to what extent it will be bound by the facts found in the court of first instance, that we will not enter into a detailed argument on the subject.

As we read the decisions of this court, it would seem that this court has made no hard and fast rule on the subject. Each case would appear to stand upon its own peculiar facts. We assume that this court will

examine the record in the case at bar for the purpose of determining whether the plaintiff in error has been deprived of its property without due process of law. We express no opinion and do not argue the question as to how far that examination should go. This court has entertained jurisdiction of the case. We submit our view of it for its decision.

HEADING VIII (Page 310).

VIII. THE SITUATION IN PENNSYLVANIA HAS NOT BECOME INTOLERABLE BY REASON OF THE DECISION IN THE CASE AT BAR.

Counsel for plaintiff in error devote this heading to the "state of affairs in Pennsylvania," which they say is the result of the decision in the case at bar, "rendering the situation almost intolerable on account of the confiscation of property."

As proof of this "state of affairs," they cite *Beaver Valley Water Co. vs. Public Service Commission*, 71 Pa. Superior Court Rep., 43 (1919), printing the entire opinion of that court in an Appendix (p. 337).

An examination of that opinion shows that it was written by Judge Kephart, who also wrote the opinion of the Superior Court in the case at bar.

This opinion is unique in Pennsylvania jurisprudence as being in effect a dissenting opinion from a decision of the Supreme Court, filed by a lower court in another case.

It has no bearing on the case at bar. It does not even prove an intolerable situation in Pennsylvania.

The Superior Court of Pennsylvania was created by the Act of June 24, 1895, *Pa. Pamphlet Laws*, p. 212. (*Purdon's Digest*, 13 Ed., Vol. 4, p. 4498.) By section 7 of the said act it has appellate jurisdiction of all actions at law or in equity, where the amount of money really in controversy is not greater than one thousand dollars, exclusive of costs.

By an amendment of the Act (Act of May 5, 1899, P. L., 248) its jurisdiction was increased to fifteen hundred dollars. Section 10 of the act of 1895 (above) provides as follows:

> "Upon any question whatever before the said court the decision of the Supreme Court shall be received and followed as of binding authority."

Until the passage of the Public Service Company Law of 1913, the appellate jurisdiction of the Superior Court was confined to cases not involving over fifteen hundred dollars. That act authorized appeals to the Superior Court and provided what the court should determine on such appeal. From the decision of the Superior Court, an appeal was permitted to the Supreme Court, under certain conditions. (See Brief of Plaintiff in error, pp. 46, 47, 48 and 49.)

The case at bar was the first case we believe in which the Superior Court exercised a jurisdiction greater than fifteen hundred dollars.

In this case its jurisdiction was unlimited. Judge Kephart in the opinion of the Court said (R., Vol. I, p. 104):

> "The amount ascertained for engineering and contingencies is substantially correct. While it might be increased a trifle, the difference is not so large as to warrant any revision." It did not concern itself with trifles.

But it did concern itself with larger items and on the assumption that it was both an appellate court and a second administrative tribunal substituted its opinion for that of the Commission on questions of value, and added the enormous sum of $399,877.80 to the amount found by the Commission to be the fair value of this Water Company's plant for rate making purposes. Upon appeal the Supreme Court held that it had no such powers under the Public Service Company Law, and after examining the testimony the Supreme Court decided that the Commission had committeed no error and reinstated the order of the Commission.

The opinion of the Superior Court in the Beaver Valley Water Co. case cited by counsel for plaintiff in error, reflects the attitude of the Superior Court toward the Supreme Court by whose decisions it is bound, and nothing more. It may be of interest to state that the Supreme Court has allowed an appeal in the Beaver Valley Water Co. case, and there is no question but what it will dispose of the case according to right and justice under its broad powers.

HEADING IX (Page 312).

IX. THE FINDINGS OF THE COMMISSION AS TO THE COST OF THE WATER COMPANY'S PROPERTY WERE IN ACCORDANCE WITH THE EVIDENCE.

Under this heading counsel for plaintiff in error attempt to show that the findings of the Commission as to the cost of the Water Company's property are incorrect and misleading.

We do not believe this Court will enter into a detailed examination of the evidence on the question of the cost of the property as found by the Commission. It was only one of the elements, concerning which testimony was offered, for the purpose of enabling the Commission to ascertain the fair value for rate-making purposes.

Complaint is made that interest during construction should have been allowed for two and one-half years. But this question has already been considered in our argument.

It is further asserted (p. 316) that not a dollar was allowed Mr. Hastings for his time and trouble in work done by him as a contractor, nor for a right of way he secured.

The Commission found (R., Vol. I, p. 58) that the cost of the work performed by Mr. Hastings, or his subcontractor, was $146,425.94. Counsel for plaintiff in error admit (p. 316) that for this work which cost $146,425.94 the Water Company paid Hastings cash $6,425.94, bonds $140,000, stock $140,000. Admitting (p. 317) that "it may be that in receiving $140,000 in

par value of stock of the Water Company, Mr. Hastings was, to *some extent, overpaid,*" they characterize the action of the Commission in excluding this entire $140,000 of stock from the *cost* of the property as *"arbitrary."*

Hastings was a lumber manufacturer (R., Vol. II, p. 831) and a director of the company (R., Vol. I, p. 469). As appears by the Report of the Commission (R., Vol. I, p. 58) he sub-let the contract to Bothwell & Carson, general contractors, who performed the work.

If he was entitled to $140,000 worth of the company's capital stock for his "time and trouble and right of way," we are not referred to any testimony that such was the value. Such a transaction by a director of a company, on its face, calls for an explanation, but none was made. No fair-minded Commission could have done otherwise than to exclude this preposterous and illegal claim as part of the actual cost of the Water Company's property.

Another item objected to is the finding as to the cost of the Monongahela water system.

We shall not burden the Court by going into a detailed history of this transaction.

The above-mentioned Mr. Hastings testified (R., Vol. II, p. 834) that this purchase was made to "stop competition, fighting and quarreling."

The report of the Commission (R., Vol. I, pp. 55, 56, 57) covers this subject so thoroughly that it is a complete answer to the argument of counsel for plaintiff in error.

The *reproduction* cost of the Monongahela Water System, parallel and non-parallel lines, as found by the Commission, was $18,365 for the non-parallel lines, and $21,331 for the parallel lines, making a total of $39,696 (R., Vol. I, p. 60, schedule).

The Commission in ascertaining the *fair value* of the property of plaintiff in error for rate-making purposes allowed the full amount of $18,365 for the non-parallel lines, and one-third of the reproduction cost ($63,992) for the non-parallel lines, holding they were only used and useful to one-third of their capacity.

On page 266 of their argument counsel for plaintiff in error say there is no question raised as to the value of the non-parallel lines, which was found by the Commission to be $18,365.

The opinion of the Superior Court on the question of the non-parallel lines rests upon the reproduction cost, that Court holding that the entire reproduction cost should have been allowed in fixing the fair value, so that the reproduction cost of all the Monongahela system would then be $82,357 (R., Vol. I, pp. 101-102).

Plaintiff in error is asking this Court to reinstate the order of the Superior Court, which was based upon reproduction cost alone.

We are unable to see why counsel for the plaintiff in error endeavor to show (p. 322) that the cost of the Monongahela Water System was $102,931.20, when their contention in issue is that the entire reproduction cost should have been allowed.

In an endeavor to convict the Commission of error an extended argument is made (pp. 317-328) to show

that in the purchase of the Monongahela stock from Mr. Haas "the parties dealt at arm's length." A statement of the facts will be sufficient. Mr. Haas secured an option on 97 per cent. of this stock for about $60,000 after payment of a commission to himself on the sale. He immediately sold the same to the plaintiff in error for the sum of $292,450, said amount being paid $100,000 in notes and $192,450 in capital stock of the plaintiff in error (R., Vol. I, p. 55). The latter was represented in the transaction by its then president, John M. Hastings (R, Vol. II, p. 832), the gentleman who received $140,000 of the capital stock of his company for his time and trouble, already referred to (R., Vol. I, p. 58) (*Ante,* p. 51).

Much else might be said about this transaction, but nothing more. *Res ipsa loquitur.* (R., Vol. I, p. 72.)

It is pertinent to recall the language of the Superior Court in its opinion relative to brokerage:

> "While the company in undertaking to allow exorbitant amounts fell into error, and such issues were clearly unreasonable and grossly in excess of any fair demand, still we cannot deny to the *innocent stock* and bond holder the justice of securing a reasonable allowance for brokerage as a capital charge" (R., Vol. I, p. 105).

HEADING X (Page 329).

X. THE FEDERAL QUESTION AS RAISED ON THE RECORD.

Counsel for plaintiff in error assert the Federal question was properly raised on the record. We do not argue to the contrary.

HEADING XI.

XI. THIS APPEAL IS AN ATTEMPT TO HAVE THIS COURT CONFIRM THE SUPERIOR COURT IN ITS CONSTRUCTION OF ITS POWERS UNDER THE PUBLIC SERVICE LAW, CONTRARY TO THE CONSTRUCTION PLACED THEREON BY THE SUPREME COURT OF PENNSYLVANIA.

While the sole question for determination in this Court is whether the valuation found by the Commission deprived the plaintiff in error of its property without due process of law, the entire Brief of counsel for plaintiff in error has beeen constructed around an elaborate argument on the question of the jurisdiction of the Superior Court of Pennsylvania on an appeal from an order of the Commission.

It is plain that this appeal is being prosecuted for the purpose of having this Court confirm the Superior Court in its construction of its powers under the Public Service Company law of Pennsylvania.

The prayer for reversal (R., Vol. I, p. 139) and the argument of counsel (p. 168) request this Court to go so far and no further. They ask that the judgment of the Supreme Court be *reversed* and that the judgment of the Superior Court be ***reinstated.***

If plaintiff in error is successful in this appeal, within the precise limits it would confine this Court, then the Superior Court will be clothed with powers never contemplated by the Legislature of Pennsylvania, when it enacted the Public Service Company Law, and the Public Service Commission will be deprived of all discre-

tionary power to consider the various elements of value which go to make up the fair value of the property of the plaintiff in error.

If the judgment of the Superior Court is reinstated by this Court the Commission in determining the fair value of the property of the plaintiff in error will be restricted to the reproduction cost of the property, and in some items will be compelled to find particular amounts as testified to by witnesses for the plaintiff in error.

If plaintiff in error would clothe the Superior Court with such powers, is not the remedy in the Legislature of Pennsylvania and not by a construction it would have this Court place upon the Public Service Company law?

Since January 1, 1914, the plaintiff in error has been collecting from the thirty-five thousand people living in the district served by it water rates found by the Commission to be unjust and excessive.

This it has been enabled to do by refusing to abide by the order of the Commission and litigation in the courts, which we trust will terminate in this proceeding.

Respectfully submitted,

DAVID L. STARR,
ALBERT G. LIDDELL,
LEONARD K. GUILER,

Attorneys for Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough, and William B. Dawson, Defendants in Error.

FILED

OCT 9 [illegible]

JAMES D. MAHER, [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

No. [illegible], October Term, 1919.

OHIO VALLEY WATER COMPANY,
Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM R. DAWSON, AND THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
Defendants in Error.

Brief of The Public Service Commission of the Commonwealth of Pennsylvania, Defendant in Error.

BERNE H. EVANS,
Counsel,
For the Public Service Commission of
the Commonwealth of Pennsylvania,
Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 128. October Term, 1919.

OHIO VALLEY WATER COMPANY,
Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH AND AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, AND THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.
Defendants in Error.

Brief of The Public Service Commission of the Commonwealth of Pennsylvania, Defendant in Error.

STATEMENT OF THE CASE

The Public Service Commission of Pennsylvania, after hearing, fixed rates which could be charged by the plaintiff in error, a water company, and from this decision of the Commission the company took an appeal to the Superior Court. That Court reversed the Commission and directed it "to reform its valuation in accordance with this opinion, and upon such valuation it shall fix a schedule of rates which shall cover

the expenses, depreciation, etc., and the return per cent. as found by the Commission to be fair." It differed from the Commission upon the question of values and substituted its judgment for that of the Commissior. This resulted in an increase in the fair value of the company's property from about $925,000 to about $1,325 000, and from the Superior Court the Commission and those who had complained to it appealed to the Pennsylvania Supreme Court.

That Court, the highest Court of the State, reversed the Superior Court and reinstated the order of the Commission, and it is from this action that the appeal here is taken; the company alleging that the proceeding deprives it of its property without due process of law.

The Pennsylvania Supreme Court stated that the water company's appeal to the Superior Court "presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry *was involved* the question of the fair value, for rate-making purposes, of the property of the appellant, and the amount of revenue which appellant was entitled to collect." (R. Vol. 1, p. 116). It decided that "a careful investigation of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the Commission on the question of values, there was merely the substitution of its judgment for that of the Commission, in determining that the order of the latter was unreasonable" (R. Vol. 1, p. 121).

The "Statement of the Case" of the plaintiff contains much that is argument and many deductions which we believe the record fails to justify. Believing them to be unimportant, we will not burden this Brief with replies, but we call the Court's attention to what we believe to be the fundamental error in the plaintiff's

case—the assertion on page 12 of the Brief that the Supreme Court of Pennsylvania, "on the ground that there was substantial evidence to support the Commission's findings, held that the water company had no right to a judicial review of the question whether its property was confiscated in violation of the Fourteenth Amendment."

ARGUMENT

In order to follow the argument of the plaintiff in error, it is advisable to specifically deny some of the conclusions set out in the "Summary of the Argument" (Plaintiff's Brief, p. 29-42).

The Pennsylvania Supreme Court did not dispose of this case as if the question of confiscation were merely a legislative or administrative question, nor did it hold that the findings of fact of the Commission must be upheld if supported by substantial evidence. (Plaintiff's Brief, p. 30).

The opinion of that Court shows conclusively that it examined "the voluminous record" and decided that on each of the contested points the decision of the Commission as to fair value was sustained by "ample testimony," or by "competent evidence" or was not unreasonable. There is no statement by that Court that the Commission's findings *must* be sustained if supported by *substantial* evidence, and we submit that the entire opinion shows a most careful effort to determine whether the result reached by the Commission was reasonable and in conformity with law, and was not confiscatory.

The Supreme Court clearly states its reason for reversing the Superior Court and it does not base

its action on the theory that the Court could "not examine the fact further than to determine whether there was substantial evidence to sustain the order" of the Commission, as stated on page 31 of Plaintiff's Brief. The quotation there used is not the language of the Pennsylvania Supreme Court, but of this Court in *Interstate Commerce Commission* vs. *U. P. R. R.*, 222 U. S. 541, 547, quoted by the State Court at page 114 R. Vol. 1. We submit that the plaintiff has misconstrued the decision of the State Supreme Court, which is in line with all decision of this Court and of the states.

Again we deny the statement at page 33 of the Plaintiff's Brief that the Superior Court increased the values because the Commission "either through error of law or by findings made without any evidence to support them" eliminated certain elements of values. The Superior Court increased the values because it erred as to the law and it erred as to its *judicial function*, attempting to act as a second Commission—at least so we interpret the Supreme Court decision.

The Commission did not fix the gross annual revenue of the water company except as a basis for figuring the reasonable rate. It did not even intimate that the rates would be excessive or unreasonable if the annual revenue for the first year after the rates became effective should be $200,000 instead of $135,000, and yet the plaintiff at page 34 of its Brief seems to so construe the decision.

The decisions of the Superior and the Supreme Courts of Pennsylvania hardly warrant the statement (Plaintiff's Brief, p. 35) that they affirmed a finding that the company was entitled to receive seven per cent. on the value of its property. The Superior Court ordered the Commission to fix a schedule of rates which would cover that per cent. return on its valuation, but neither Court said such a percentage

of return was required to produce a non-confiscatory revenue, and the Supreme Court undoubtedly was of opinion that seven per cent. on the *Commission valuation* was reasonable. Nothing said by either Pennsylvania Court, or by any other Court, we believe justifies the suggestion here held out that the rate of return must be seven per cent. on a *particular rate base* in order to prevent confiscation.

We are convinced that the decision of the Supreme Court of Pennsylvania shows that the Superior Court erred in its consideration of this case in that it did not follow the law, that the Supreme Court concluded that the evidence on the contested points was competent, ample and sufficient to sustain the Commission's findings and that the conclusion was just and reasonable.

Finally, in answer to the statements at page 38 of Plaintiff's Brief, we submit to this Court that the situation which plaintiff pictures does not in fact exist —the Courts are still open and performing *judicial* functions according to law. Neither the plaintiff nor the Superior Court has correctly interpreted the Supreme Court's decision in this case.

I.

THE PERTINENT PROVISIONS OF THE PENNSYLVANIA PUBLIC SERVICE COMPANY LAW.

In addition to the provisions of the Public Service Company Law quoted by the plaintiff, we desire to call the Court's attention to the following:

Art. VI, Sec. 6:

> "Any person or corporation, public service company or municipality, complaining of anything

done or about to be done, omitted or about to be omitted, by any public service company, in violation of any of the requirements or provisions of this act, or of any lawful determination, ruling, or order of the Commission, may apply to the Commission by petition, duly verified by the affidavit of the complainant, which shall contain a concise statement of all the material facts upon which the complaint is founded. Said petition shall be filed of record with the commission; whereupon a copy of the petition thus presented and filed shall forthwith be forwarded by registered mail, by the commission, to any officer or agent of the public service company or public service companies complained against, accompanied by a notice from the commission calling upon the public service company or public service companies complained against to satisfy the complaint, or to answer the same in writing, within such reasonable time as may be specified by the commission in said notice." Purdon's Digest, Vol. 6, p. 7232.

Art. VI, Sec. 7:

"If such public service company, within the time specified, shall satisfy the complaint, the commission shall dismiss the petition, but said public service company shall be relieved from responsibility only for the specific matter complained of. If such public service company shall not satisfy the complaint within the time specified, and it shall appear to the commission, from a consideration of the complaint and answer, or otherwise, that reasonable ground exists for investigating said complaint, it shall be the duty of the commission to fix a time and place for a hearing, and to investigate the matter complained of in accordance with the provisions of this act. Notice

of the time and place of such hearing shall be given to the petitioner and to the public service company or companies complained against, in such manner as the commission may prescribe. The testimony shall be taken down by the stenographer appointed by the commission, and a full and complete record shall be kept of all proceedings had before the commission or any commissioner on any hearing or investigation." Purdon's Digest, Vol. 6, p. 7232.

Art. VI. Sec. 29:

"Nothing in this act shall be construed to deprive any party, upon any such appeal and judicial review of the proceedings and orders of the commission, of the right to trial by jury of any issue of fact raised thereby or therein, where such right is secured either by the Constitution of the Commonwealth or the United States, but in every such case such right of trial by jury shall remain inviolable: Provided, however, That when any appeal is taken, such right shall be deemed to be waived upon all issues, unless expressly reserved in such reasonable manner as shall be prescribed by the superior court." Purdon's Digest, Vol. 6, p. 7235.

II.

THE QUESTION RAISED HERE BY THE PLAINTIFF IN ERROR

Without attempting to refer to all the errors assigned we submit that the Plaintiff bases its appeal

here upon the proposition set forth in the Fourth and Fifth assignments of error. These assignments are:

> FOURTH. The Pennsylvania Public Service Company Law, being an Act No. 854, approved July 26, 1913, P. L. 1374, as amended by an Act No. 345, approved June 3, 1915, P. L. 779, as further amended by an Act No. 311, approved July 11, 1917, P. L. 808, was interpreted by the Supreme Court of Pennsylvania as giving The Pennsylvania Public Service Commission power to fix the gross annual revenue and the total annual fair return to which the Ohio Valley Water Company is entitled and as limiting the Superior Court of Pennsylvania, on appeal from the order of the Commission, to the determination of the question merely whether there was substantial evidence to support the Commission's order, and as denying to the Superior Court the right to reverse the Commission's order, notwithstanding, in the judgment of the Superior Court, on the whole case, the order of the Commission should be reversed because contrary to the weight of the evidence. The Pennsylvania Public Service Company Law, as thus interpreted by the Supreme Court of Pennsylvania, deprives the Ohio Valley Water Company of its property, without due process of law, and is, therfore, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.
>
> FIFTH. If the Pennsylvania Public Service Company Law is to be interpreted as meaning that the Courts, under the facts in this case, are without authority to reverse the order of The Pennsylvania Public Service Commission fixing the gross annual revenue and the total fair return to which the Ohio Valley Water Company is entitled,

the Pennsylvania Public Service Company Law deprives the Ohio Valley Water Company of its property without due process of law and is, therefore, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

The other assignments relate directly to the propositions there advanced and in answer to the main contention we will argue that

FIRST. THE DETERMINATION OF THE FAIR VALUE OF PLAINTIFF'S PROPERTY IS JUDICIAL DETERMINATION AND IT HAS BEEN REVIEWED IN A JUDICIAL MANNER.

SECOND. THIS DETERMINATION WAS REACHED BY DUE PROCESS OF LAW.

THIRD. THIS COURT, ON WRIT OF ERROR, WILL NOT WEIGH THE EVIDENCE AS SUGGESTED BY PLAINTIFF.

FOURTH. THE STATE SUPREME COURT'S DECISION DOES NOT DEPRIVE THE PLAINTIFF OF ANY PROPERTY.

First.

In determining the fair value, gross and net annual return, and rate of return to which the Company was entitled, the Commission was performing a judicial function.

The Plaintiff in Error argues that the order of the Commission was purely and simply legislative and that

the Company nas been denied a proper investigation as to the constitutionality of that action.

One of the questions raised by the Plaintiff in its appeal in the State Court from the Commission's order was:

> "The report, findings, conclusions, ruling, determination and order of the Commission amounts to a deprivation of property without due process of law in violation of the Fourteenth Article of Amendment to the Constitution of the United States and of the first and tenth sections of the First Article of the Constitution of Pennsylvania." (R. Vol. 1, P. 82).

It therefore presented to the State Court as clearly as could be done the precise question which is the foundation of its appeal to this Court.

We feel that it is hardly necessary to refer to the cases cited and quoted by the Plaintiff to sustain its contention that the prescribing of a rate for the future is a legislative and administrative act, whether it is done by a Commission, a Court or by the Legislature itself. The Courts of Pennsylvania have recognized this principle and have in this, as in many other cases, acted upon it.

Nor do we deny that the question as to confiscation of the property of the Plaintiff in Error is one that can not be finally and conclusively determined by the Commission. We doubt whether any quotation in Plaintiff's Brief relating to judicial review of rate regulating decisions goes so far in upholding the powers of the Courts as does the opinion of the Pennsylvania Supreme Court in *Pennsylvania Railroad* vs. *Philadelphia County,* 220 Pa. 100:

In that case the Courts reviewed an act of the Legislature fixing a maximum passenger rate of two cents a mile. The Supreme Court said:

> "Whether the Legislature has attempted to enact a measure prohibited by the Constitution is for the Courts; whether injustice has been done in any particular case is inherently and necessarily a judicial question. * * * In other States, and in the absence of any cases of our own, it has been sometimes assumed that to be invalid the provisions of a statute must be unreasonable to the extent of being confiscatory of the corporation's property and rights, and that phrase was used by the Court below. But it is manifest that it is used in a special and qualified sense. The point of injustice is reached long before that of confiscation and to make the word confiscatory really appropriate it must be read, not in the sense of producing actual confiscation, but of having an inevitable tendency thereto."

It can not well be said that the Court which rendered this decision is inclined to look upon *any* act of the Legislature as preclusive of judicial review, and we submit that the State Court in this proceeding followed its earlier decisions and judicially reviewed the action of the Commission. We, therefore, pass by the argument in Plaintiff's Brief, pp. 67-114 with the observation that the principles established by the cases cited have no relation to the error alleged in this case.

Before we consider the action of the State Court let us look at the action of the Commission in its general result.

The Plaintiff in error had been furnishing water for about ten years before the Public Service Company Law of Pennsylvania was passed and it had the right to charge reasonable rates, subject to review by the Courts. (Purdon's Digest, Vol. 2, p. 1789.) The rates which it voluntarily exacted had produced gross annual revenue during this period which had never ex-

ceeded $123 000 and had not been less than $78,000. (R. Vol. 1, p. 16.) The Public Service Company Law became effective for all purposes on January 1, 1914, and in December, 1913, the Company established the new rates complained against. It has been collecting those rates ever since and its gross revenue for 1914 was $164,865.25. The amount which the Commission estimated that the rates fixed under its order would produce was $135,167, and this amount is *over 10% more* than the gross revenue for 1913, the last year before the Commission was established. Also the Commission rates would produce net revenue, after operating expense had been deducted, in excess of any net earned by the Company prior to 1913. There is no suggestion that the rates fixed by the Commission will not produce the gross revenue estimated, which will, of course, increase as the number of consumers increases in this rapidly growing community.

The Commission held public hearings at which the witnesses were sworn, took all the testimony offered by the Company, which went into every question that could possibly have any bearing on rates or values, permitted argument and re-argument and established rates to be effective in the future for every service rendered by the Company.

There can no longer be much doubt but that this action could have been taken by a Commission without any extended investigation as to the value of the property of the Company, and we do not understand the Plaintiff to contend that the findings of the Commission as to the fair value of its property were a necessary prerequisite to the fixing of a rate which would be prima facie reasonable. Nothing in the Public Service Company Law requires the Commission to determine the fair value of the property before it establishes rates, nor was it necessary for it to state what was a fair rate of return. If its action in fixing a rate for the future is legislative and administrative

it can be based on such considerations as would move the Legislature, and the Commission would not even be forced to hold a hearing. Its action would then come before the Court for review upon a constitutional question in the same manner and entitled to the same effect as an act of the Legislature.

But the Legislature of Pennsylvania has not only authorized the Commission to perform such functions, under certain stipulated conditions—it has also constituted the Commission a body which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws already supposed to exist." *(Prentis* vs. *Atlantic Coast Line Co., 211 U. S. 210.)*

It has made the Commission the body which determines whether rates demanded, charged, exacted or collected are unjust or unreasonable, and if it finds that rates collected were unreasonable it has power to make an order for reparation, which order shall be prima facie evidence that the amount awarded is justly due. (Purdon's Digest, Vol. 6, p. 7223.)

Therefore when, as in this case, existing rates, lawfully established, are alleged to be unjust and unreasonable the Commission is called upon to perform a function that has always heretofore been performed by a Court in Pennsylvania—determine whether those rates are *in fact unreasonable.*

In *Interstate Commerce Commission* vs. *Cincinnati,* etc. Ry. Co., 167 U. S. 479, this Court said:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

And in *Cin. N. O. & S. P. R. Co.* vs. *I. C. C.,* 162

U. S. 184 it was said, in speaking of the power of the Interstate Commerce Commission;

> "The reasonableness of a rate in a given case depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight."

It has for centuries been the duty of Courts to find and determine whether rates are reasonable and just, and in Pennsylvania from the time of the passage of the present incorporation law in 1874 this duty has been laid upon them by statute where the rates of water companies are questioned. (Purdon's Digest, Vol. 2, p. 1789).

Prior to the passage of the Public Service Company Law in 1913 the Courts of the State were often called on to decide the reasonableness of rates of water companies; and when that Act was passed it provided for the *repeal* of the law placing this duty upon the Courts.

For the convenience of the Court we quote the pertinent provisions of the old law and of the Public Service Company Law:

The Act of April 29, 1874, under which Plaintiff was incorporated after providing for the incorporation of water companies contained this proviso: (Clause 7, Sec. 34),

> "And provided further, That the court of common pleas of the proper county shall have jurisdiction and power, upon the bill or petition of any citizen using the gas or water of any of said companies, to hear, inquire and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce

obedience to their decrees by the usual process." (Purdon's Digest, Vol. 2, p. 1789.)

The Public Service Company Law provides:

> " * * * and the provisos of clause seven of section 34 of an act, entitled 'An Act to provide for the incorporation and regulation of certain corporations, approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four' (Pamphlet Laws, Seventy-three)—be and the same are also hereby repealed." (Purdon's Digest, Vol. 6, p. 7238.)

The powers and duty of the Court under the earlier statute are explained at length in *Brymer* vs. *Butler Water Co.*, 179 Pa. 231, and in *Turtle Creek Boro* vs. *Penna. Water Co.*, 243 Pa. 401, and we particularly call the attention of this Court to the latter case.

The bill was against a water company, under the Act of 1874 above quoted, and alleged that new rates established by the Company were unreasonable. The testimony was taken by a chancellor, who made certain findings of fact, among which were findings of the fair value of the property, of the gross annual return which the Company was entitled to earn as a maximum, of the amount of its operating expenses, and of the unreasonableness of the Company's rates. The Company appealed from the permanent injunction restraining it from collecting its increased rates and requiring it to charge the rates fixed by the Court for certain consumers.

The Supreme Court of Pennsylvania said:

> "Learned counsel for appellant state the two fundamental questions in all of the cases to be: (1) The value of the water company plant; and

(2) the net earnings the Company should be allowed as a fair return upon that valuation." There are seventeen assignments of error, but they all relate to the two fundamental questions just stated, and need not be discussed separately. It is strongly urged by counsel for appellant that the court below should have found as a fact under the evidence the value of the plant to be $3,300,000, and that it was error to fix its valuation at $2,750,000, as the learned chancellor did. * * * It has been necessary to read the testimony of a large number of witnesses in order to intelligently review the findings of fact upon which the court below based its conclusion as to the value of the plant. Having done so, we are not prepared to say that the trial judge either arbitrarily scaled down valuations placed on the plant by witnesses, or entirely eliminated certain items which should have been allowed in fixing the valuation. * * * Upon the question of value the testimony was conflicting and it was the duty of the court to consider all of the relevant facts in fixing a fair valuation upon the properties. It may be, as appellant contends, that the weight of the testimony would justify a higher valuation, but the question for decision here is whether there was such palpable error in the findings of fact as to warrant a reversal of the decree. Appellate courts do not reverse findings of fact by a court of first instance unless there be manifest error. This is the rule of all the cases, and, as we view it, is conclusive against appellant on this branch of the case at bar. The testimony was *ample to sustain the conclusion reached, and this is the limit of our inquiry:* Rorabaugh's Est., 229 Pa. 377. It is not ground for reversal on the findings of fact that a different conclusion might have been war-

> ranted from the evidence, or that this court might have arrived at a different result if called upon to determine the fact as a court of first instance: Plankington's Est., 212 Pa. 235. Our duty in reviewing findings of fact, is to ascertain whether there was testimony, which, if believed, would sustain the findings: Oil Well Supply Co. *vs.* Manufacturing Co., 234 Pa. 378." (Italics ours.)

This case shows unmistakably that the Court had the power to determine, after hearing, that rates were unreasonable because they produced a return, upon the value fixed by the Court, which was more than the Company was entitled to receive—a judicial question. And we believe there can be no doubt that the power exercised by the Court was taken away from it by the repeal contained in the Public Service Company Law and vested in the Commission.

> "If the case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the second section of the Act of April 29, 1874, P. L. 73, which gave Courts the power to determine questions of this character was repealed by the Public Service Company Law approved July 26, 1913, P. L. 1374. In other words the Legislature took this power away from the Courts and conferred it upon the Public Service Commission. Hereafter, so long as the Act of 1913 remains in force, the question of the reasonableness of rates established by public service corporations, must in the first instance be submitted to the Public Service Commission when challenged."

Bellevue Boro. vs. *Ohio Valley Water Co.*, 245 Pa. 114.

See also *St. Clair Boro.* vs. *Tamaqua*, etc., 259 Pa. 462.

New Brighton vs. *New Brighton Water Co.*, 247 Pa. 232, where the Court speaks of the duty of the Commission to ascertain facts on which property rights directly depend.

Therefore when the increased rates of the Plaintiff in Error were attacked a judicial question was presented to the Commission and its decision upon the question of the reasonableness of those rates was a judicial act. It was compelled to hold hearings and weigh the evidence, having the same functions in every respect as the Court formerly had. Its decision, where the *entire revenue* of the Company was in question, could not be reached without a determination of the fair value of the property, whereas its conclusion on a purely *legislative* question required no consideration of value. In carrying out this duty of determining whether the rates as a whole, were or were not unreasonable it therefore inquired into the fair value of the Plaintiff's property, and from its decision the Plaintiff had an appeal in accordance with the laws of Pennsylvania. That appeal was to determine whether the decision of the Commission on the judicial question of the reasonableness of the rates was violative of some rule of law, because undoubtedly the Commission was acting within both its constitutional and its statutory powers. It was the review which appellate courts almost universally give to the decisions of courts of first instance or, as had been the practice in Pennsylvania, to the findings of a chancellor.

We wish to call the Court's attention to the fact that in Pennsylvania the Commission does not pass upon rates until it has determined, after hearing, that the rates fixed by the utility are unreasonable or in other respects contrary to law. It has no power to suspend the utility's rates while it is determining this

judicial question. In speaking of the duty of the Commission the Pennsylvania Superior Court said:

> "Of course, even after the rates filed by this appellant (the railroad) became effective it was still competent for any one affected by them to complain to the Public Service Commission that the rates in force were unreasonable. But in this case the law casts upon the complainant the burden of proving that the effective rates attacked are unreasonable—in other words under such circumstances, the Public Service Company is placed by the law in the position of a defendant *in an ordinary action at law*. He is not required to produce any evidence until the plaintiff has, prima facie at least, offered proof which, if unanswered, would warrant a judgment in his favor." (Italics ours.)

After referring to the evidence produced before the Commission the Court said:

> "Excluding for the moment from our consideration two schedules or tables of rates to which we shall refer, they (the findings of fact) are of a general character without any indication of the fact or facts established by the evidence on which it *could or should be judicially determined the existing effective rates of the carrier should be set aside and 'reasonable rates' substituted.*" (Italics ours.)

Balt. & O. R. R. Co. vs. *P. S. Com.*, 66 Pa. Sup. Ct. 403.

The case involved the rates on a single commodity for a designated haul and yet the Court reversed the Commission not because its *legislativie action was unreasonable*, but because its judicial determination of

the unreasonableness of the existing rate was not arrived at in the manner prescribed by law. We believe it held that before the Commission can act legislatively in establishing a rate, it must decide the judicial question of the reasonableness of the existing rate—and that decision will be judicially reviewed.

See also *McCrady Bros. Co.* vs. *Pgh. & L. E. R. R. Co.*, 66 Pa. Sup. Ct. 307.

The cases on which Plaintiff relies most strongly are *Prentis* vs. *Atlantic Coast Line Co.*, 211 U. S. 210; *Western Union Tel. Co.* vs. *Myatt*, 98 Fed. 335, and *Louisville & Nashville R. R. Co.* vs. *Garrett*, 231 U. S. 298, but we believe none of these cases goes so far as the Plaintiff, nor are they controlling in this case, because they do not contain a finding, judicially arrived at, of fair value.

In the *Prentis* case (supra) the Virginia State Corporation Commission had fixed a rate for passenger fares which was attacked by the railroads by means of a bill for an injunction in the United States Courts. To this a demurrer was filed, it being alleged that the United States Courts were forbidden to enjoin the proceedings of a State Court—which the Commission alleged itself to be.

This Court decided that the action of the Virginia Commission was a legislative Act, because it was "the making of a rule for the future." The question was the right of the Federal Court to enjoin the State Court and not whether there had been a *judicial determination of value.* The Virginia Commission had not put a value on the railroad property, it was not declaring "liabilities as they stand on present or past facts under laws already supposed to exist." In Pennsylvania "the moment of legislation" passed when the Legislature made the Commission the tribunal to determine the fair value of the Company's property in the same manner and for the same pur-

poses that a chancellor had determined it under the Act of 1874.

In the *Prentis* case "it is to be assumed that the order confiscates the plaintiff's property and infringes the 14th Amendment. The question principally argued and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the Courts of the United States are not at liberty to impugn. (P. 223.) No such question is here presented.

Nor in *Western Union Tel. Co.* vs. *Myatt* (supra) was the Court dealing with a case where a valuation had been made by a body lawfully authorized to determine that fact. There was no finding of value in the case—it was an action for the future alone. The Court said:

> "Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to *determine whether existing or prescribed rates are unreasonable is a judicial function.*" (Italics ours.)

Here we have a determination of fair value; a determination of what the law is in relation to existing facts, and, in so far as the value of the property of Plaintiff is concerned, there is not in this determination any rule for the future.

The Act under which the Court of Visitation in the *Myatt* case was established was contrary to the Kansas Constitution, but this case presents no such question, and Plaintiff seems to admit that judicial and administrative functions can be joined in one body in Pennsylvania. (Plaintiffs' Brief, p. 67.)

Louisville & Nashville R. Co. vs. *Garrett,* (supra) was another case in which an injunction was asked from the Federal Courts to restrain the enforcement of Commission fixed rates. Here again there was no

determination of value and fair return—the entire action of the Commission was legislative.

We believe this distinction runs through all the cases cited by the Plaintiff and that there is no case in this or any other Court which holds that the Legislature may not establish a body to determine judicially the value of the property of a utility, provided that body proceeds after notice and opportunity to be heard. Having given that body this judicial function it may provide for the review of its decision on this *fact* by an appeal similar in every respect to the appeal from a chancellor. If the law of Pennsylvania provided that the property of a utility could be taken by a municipality at a price to be fixed by a Commission after notice and hearing, appeal from the Commission's decision to be with the same effect as an appeal from a Chancellor, it would hardly be contended that such a proceeding was not due process of law; and yet that *alone* is the contention here. The valuation by the Commission is not the establishment of a jurisdictional fact, it is a judicial determination by due process of law.

The appeal provisions of The Public Service Company Law authorize the Superior Court to reverse, if it finds the order to be unreasonable or based upon incompetent evidence materially affecting the determination or order of the Commission, or otherwise not in conformity with law. (Plaintiff's Brief, p. 47).

It provides that the appeal to the Supreme Court shall be "with the same effect as is provided in other cases of appeal to the Supreme Court from the courts of common pleas of the Commonwealth." (Plaintiff's Brief, p. 49.)

The Act of June 25, 1895, (P. L. 212) provides that "whenever a case is appealed to the Supreme Court from the Superior Court the appeal shall be taken from the judgment of the Superior Court, but the whole

proceeding shall be brought thereby within the jurisdiction of the Supreme Court, who may enter therein such judgment, order or decree as may be just * * * * and who may thereupon send the record either to the Superior Court, or directly to the Court below, as the Supreme Court may consider advisable." (Purdon's Digest, Vol. 2, p. 1444.)

Furthermore, the Act of May 20, 1891, provides that

> "The Supreme Court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from and to enter such judgment, order or decree in the case as the Supreme Court may deem proper and just, without returning the record for amendment or modification to the Court below and may order a verdict and judgment to be set aside and a new trial had." (Purdon's Digest, Vol. 2, p. 1439.)

These provisions surely give the Supreme Court the widest possible authority to review and it has consistently acted in accord with the principles set out above. It has judicially reviewed the findings of auditors and masters, conclusions of fact by chancellors, verdicts by juries and awards by compensation boards; but where it found a fact determined after due process by those authorized by law to make such determination it has refused to reverse the determination unless there was manifest error. If the testimony was *ample* to sustain the conclusion reached the Court will not reverse.

Kaufmann vs. *Long*, 82 Pa. 72.
Keller's Road, 154 Pa. 547.
Leonard vs. *Smith*, 162 Pa. 284.
Bugbee's Appeal, 110 Pa. 331.
Barnes' Estate, 221 Pa. 399.
McCarl vs. *Houston*, 263 Pa. 1.

We submit that the Court had, *and exercised,* exactly the same power which this Court speaks of in *People, etc.* vs. *McCall, 245 U. S. 345,* where Mr. Justice Clark said that this Court

> "Will enter upon such an examination of the record as may be necessary to determine whether the Federal constitutional right claimed has been denied, as *in this case, whether there was such a want of hearing or such arbitrary or capricious action* on the part of the Commission as to violate the due process clause of the Constitution.

It went further than that statement required because it determined from an examination of the testimony that each separate, contested finding of fact was not to be interfered with because they were all *reasonable,* based on competent and ample testimony. These contested findings related to only one subject of inquiry—the value of the property; and the Supreme Court saw no reason to disturb that.

We believe that this Court has clearly stated the principles applied by the State Supreme Court in *Interstate Commerce Com.* vs. *U. P. R. R., 222 U. S. 541,* as follows:

> "While there has been no attempt to make an exhaustive statement of the principles involved, in cases thus far decided it has been settled that the order of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against tak-

> ing property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or, (6) if the authority there involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The Pennsylvania Supreme Court acted upon this decision and we believe thoroughly understood its application to the present case. When it stated that

> "The appeal presented for determination the question whether the order appealed from was reasonable and in conformity with law and in this inquiry is INVOLVED THE QUESTION OF THE FAIR VALUE, FOR RATE-MAKING PURPOSES, OF THE PROPERTY OF THE APPELLANT AND THE AMOUNT OF REVENUE WHICH THE APPELLANT WAS ENTITLED TO COLLECT."

it could not well have had in mind anything except an inquiry whether "the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law."

It reviewed the finding of fact judicially in the manner approved by many decisions.

See *Interstate Commerce Com.* vs. *Illinois Cent. R. R., 215 U. S.* [illegible],

Atchison, Topeka & Santa Fe R. R. vs. *U. S.*, 232 U. S. 199;

I. C. C. vs. *L. & I. Ry.*, 227 U. S. 88;

P. S. Com. vs. *Northern Central R. R.*, 122 Md. 388;

M., St. P. & S. S. M. Ry. vs. *Commission,* 136 Wis. 146;
Grand Rapids & I. R. R. Co. vs. *Michigan R. R. Com.,* 154 N. W. 16;
State vs. *Great Northern R. R.,* 153 N. W. 257;
West Jersey & S. S. R. R. vs. *Commission,* 94 Atl. 57;
People vs. *N. Y. & Queens Gas Co.,* 113 N. E. 795;
Turtle Creek Boro. vs. *Penna Water Co.,* 243 Pa. 401.

Second

THE DETERMINATION OF THE FAIR VALUE OF THE PLAINTIFF'S PROPERTY WAS REACHED BY DUE PROCESS OF LAW.

The State Supreme Court definitely passed upon the procedure involved in this case when it held that the valuation of the Commission was in conformity with law.

No question is raised as to the right of the Legislature to vest in the Commission judicial or quasi-judicial functions, and this Court has determined that "due process is not necessarily judicial process."

Reetz vs. *Michigan,* 188 U. S. 507.

The question of whether jurisdiction over particular classes of cases is vested in one tribunal or another is a question of local law.

See *Church* vs. *Kelsey,* 121 U. S. 282; *Dreyer* vs. *Illinois,* 187 U. S. 84.

In the present case there was notice, to the Plaintiff here that the Commission would investigate the reasonableness of its rates at public hearings; it appeared and produced testimony to show that the in-

creased rates were reasonable; the Commission heard all its testimony relating to the value of its property which was introduced for the purpose of showing that unless the revenue contended for was produced by the rates confiscation would result. The *one and only issue* was the value of the property and return thereon, and no more thorough hearing on this question could have been held.

It was the same question which is presented by the ordinary condemnation case, "What compensation shall be paid?"

In such cases, while the question of compensation is a judicial question, the nature of the tribunal which determines it is for the Legislature. The requirement of law is that it be an impartial tribunal and that it shall decide only after notice and hearing.

> "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided, there is that due process of law which is required by the Federal Constitution."
>
> *Backus* vs. *Fort. St. Depot Co.*, 169 U. S. 567.

And in *United States* vs. *Jones*, 109 U. S. 513, this Court said:

> "The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the

> property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an Act of Congress, or one already established by the states shall be adopted for the occasion, is a mere matter of legislative discretion."

In *Long Island Water Supply Co.* vs. *Brooklyn*, 166 U. S. 685, the value of the property was fixed in condemnation proceedings by Commissioners, who were required "to make and file a report of their proceedings and determination in the Supreme Court of the County of Kings and that application must be made to that court for a confirmation of the report; that notice of such application must be given; and that 'upon such application the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award, in part or in whole, is excessive, or is insufficient'; and appeal was allowed from the decision of that court to a higher. We do not question the proposition that form is not the only thing essential to due process."

This Court there held:

> "It may be true, as contended, that as construed by the Court of Appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings."

The procedure in this case was exactly the same as in *New York & Queens Gas Co.* vs. *McCall*, 245 U. S.

345; the decisions of the State Courts being practically identical and the only difference we can see is that in this case there was a determination "of the fair value of the entire property." In the opinion by Mr. Justice Clarke this Court said:

> "The result of the application of this rule to the record before us cannot be doubtful. The Gas Company appeared at the hearing before the Commission, cross-examined witnesses, introduced testimony and argued the case. On writ of certiorari the case was re-examined by the Appellate Division of the Supreme Court, and it was again reviewed on appeal by the Court of Appeals. In the matter of procedure plainly the company cannot complain of want of due process of law."

We submit, therefore, that in so far as procedure alone is concerned there can be no question of due process in this case, and there has been no deprivation of property "in the absence of an investigation by judicial machinery." *Chicago, M. & St. P. R. Co.* vs. *Minnesota*, 134 U. S. 418.

If the determination of value and fair return, which is the subject of appeal here, is, in any sense, a deprivation of property, it has taken place in accordance with the method established by law in Pennsylvania, and that method is by judicial investigation before a tribunal which performs the same function in exactly the same way that was provided in the Act of Assembly under which Plaintiff was incorporated. The judicial review is the same review that was afforded by that Act.

We should not be understood as arguing against the proposition stated by this Court in *Chicago, Burlington, etc. R. D.* vs. *Chicago*, 166 U. S. 226, that

> "In determining what is due process of law regard must be had to substance, not to form,"

but we insist that here there is nothing lacking in substance. The rule laid down in the above case in regard to the review by this Court of a trial by jury is applicable to the present case.

> "We are permitted only to inquire whether the trial Court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation." (P. 246.)

Third.

THIS COURT, ON WRIT OF ERROR, WILL NOT EXAMINE INTO THE FACTS AS SUGGESTED BY PLAINTIFF.

The Plaintiff urges this Court to examine the testimony and decide whether it sustains the findings of the Commission; coupling that with a request that the judgment of the Superior Court be affirmed.

We believe that this Court will do neither of these things.

The State Supreme Court has positively decided that the testimony justifies the various conclusions of fact reached by the Commission and has stated that "a careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the Commission upon the question of values, there was merely the substitution of its judgment for that of the Commission * * *." It has reviewed each finding of fact relating to value and has decided that the testimony justified the Commission's conclusion.

This is not a case where the decision on the question of fact is "so involved with and dependent upon

such questions of law as to be in substance and effect a decision of the latter." *(Kansas City of Southern Ry. Co.* v. *C. H. Alberts C. Co.,* 223 U. S. 573) in placing a value on the property of the Plaintiff there was a pure decision of fact, which, we submit, this Court should treat in the same way it treated the valuation in *Cedar Rapids Gas Light Co.* vs. *Cedar Rapids,* 223 U. S. 655.

We believe that there has been no "conclusion of law as to a Federal right and finding of fact so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts," as stated in *Criswell* vs. *Knights of Pythias,* 225 U. S. 246, in this case. The entire value has been determined, that determination affirmed by the highest State Court and a return of 7% per annum allowed.

We do not by this mean that this Court may not examine the testimony and analyze it to the extent necessary to give the Plaintiff the benefit of any asserted Federal right; but here, after a mass of testimony on the question of value, the State Court has definitely decided that the findings of fact are justified by the evidence and are in conformity with law.

The Plaintiff asks this Court to *weigh* the evidence, not to examine and analyze it; to pass upon conflicts in the testimony and decide pure questions of fact, i. e. is the value of the property of this Company more than $925,000, the amount determined by the Commission and the Supreme Court of Pennsylvania. We know of no case where this Court has undertaken such a task and we submit that such action is contrary to all decisions.

Waters Pierce Oil Co. vs. *Texas,* 211 U. S. 86;
Quinby vs. *Boyd,* 128 U. S. 489;
Egan vs. *Hart,* 165 U. S. 188;
Cedar Rapids Gas L. Co. vs. *Cedar Rapids,* 223 U. S. 655.

We can not too strongly impress upon the Court the fact which is most apparent in Plaintiff's argument—that the only question which it seeks to have reviewed here is, "*what is the value of this piece of property?*"

Fourth.

THE PLAINTIFF'S PROPERTY HAS BEEN PROTECTED FROM CONFISCATION BY THE STATE COURT.

In the first place, we respectfully submit that there is not a word in the opinion of either Pennsylvania Court which can lead any one to conclude that there is a "finding which specifies the rate per cent. which the Water Company is entitled to receive on the value of its property" (Plaintiff's Brief, p. 282), if by that statement the plaintiff means that a return of less than 7% is confiscatory. That return was fixed in order to give the Plaintiff a reasonable revenue under the definition of reasonableness by the Pennsylvania Supreme Court, which has been followed by the Commission. That Court said in *Penna. R. R. Co.* vs. *Phila. County*, 220 Pa. 100, that "the point of injustice is reached long before that of confiscation," and the seven per cent. return was fixed in this case in order to fix a just rate. Our Supreme Court has recognized that a non-confiscatory revenue may be one of less than seven per cent.

Brymer vs. *Butler Water Company*, 179 Pa. 231.

Further, we believe that the undisputed facts show that there will be no confiscation under the rates established by the Commission. The Plaintiff does not allege that these rates will produce less than the amount estimated by the Commission, about $135,000

per year; nor is there any dispute that the net annual revenue, after operating expenses and depreciation allowance, will be about $65,000. The estimated operating expense is almost $4,000, more than the company expended for that purpose in the first year under the increased rates. (3 Vol. 1, p. 17) and the annual depreciation allowance is about one-sixth of the entire sum which Plaintiff had charged off to that account in over ten years. (R. Vol. 1, p. 60). It can be fairly assumed that under ordinary conditions the estimates of the Commission will exceed the requirements of the company for these purposes, and if not the Commission can be expected to provide for changed operating conditions upon petition to it.

We confidently assert that under the decree of the State Supreme Court, the net annual revenue of the Plaintiff *on the basis of 1914 consumption* will be at least 5% *on the value claimed by it*, $1,325,000; and its gross annual revenue will be at least 10% more than it ever received under rates *voluntarily* established by it.

The large investment of the company has been made, it claims an unfailing supply of pure water, it occupies a rapidly growing community where the demand will undoubtedly increase constantly and can be met at small expense. It has been relieved of free services which it voluntarily rendered and its rates have been so adjusted each service pays a rate which should attract consumers. Judging from the past its revenues will steadily increase at small expense.

The Plaintiff calls attention to the fact that the company has outstanding bonds of $1,000,000, debt of $110,000 and stock of $1,000,000. (Plaintiff's Brief, p. 9.)

In this connection we call the Court's attention to the statement of the Supreme Court of Pennsylvania (R. Vol. 1, p. 120);

"It does not appear from the record that any money

was put into the business by the stockholders. The record seems to indicate that all the property now owned by the company has been procured by the issue of bonds, or from income derived from operation."

The sacrifice of the investors is therefore limited to $1,110,000 if we grant that the bonds represent what money was put into the property, but the Plaintiff asserts that the bonds were sold at a large discount, estimated at over $90,000. (Plaintiff's Brief, p. 270.)

Even at the Plaintiff's figures the sacrifice could not have been in excess of $1,000,000, upon which the net return estimated would be 6.5%, even if revenues should not increase, which is most unlikely.

We do not use these figures to suggest that sacrifice of investors is the measure of value, but simply to indicate that Plaintiff can base no legitimate claim to confiscation on the amount of its securities.

The reason for such a security issue (aside from that given by the State Supreme Court) is found in the act under which Plaintiff was incorporated, which provides:

> "It shall be lawful at any time after twenty years from the introduction of gas or water, as the case may be, into any place as aforesaid, for the town, borough, city or district, in which said company shall be located, to become the owners of said works and the property of said company by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of 10% per annum, deducting from said interest *all dividends* theretofore declared." (Purdon's Digest, Vol. 2, p. 1789.)

As could be expected under such an Act, water companies are so capitalized that there is little in the way of *dividends* to deduct.

The Supreme Court had the question of the fair re-

turn and its relation to value fully argued and every fact that had any relation to this subject was before it; it could have reversed the Commission's finding if it had believed from the evidence that the Commission rate was unjust and yet it refused to act in spite of its own determination that injustice is reached long before confiscation.

Further we submit that a clear return of 4.88% per annum on the *company's valuation* (Plaintiff's Brief, p. 11) is not *confiscatory,* when we consider that the money which built the plant was borrowed at 5%, that the district is a permanent, well settled community, that the company has a practically permanent monopoly under the rulings of the Commission, and that the return of 4.88% is upon the basis of consumption five years ago.

This Court said in *Willcox* vs. *Consolidated Gas Co.,* 212 U. S. 19:

> "Where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property as found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating under the rate objected to, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate and thus eliminating, as far as is possible, the doubts arising from opinions as opposed to facts."

In the present case, on the basis of *1914 consumption,* if we eliminate one-half of two items allowed by the Superior Court on opinion alone, namely "going value" and "brokerage," the net return would be almost 6%, what it has been under the conditions since

1914 we have no means of knowing, but the Commission and the Courts have been open to Plaintiff to secure redress if it has not earned at least $65,000 per annum. We again call this Court's attention to the fact that there is no determination that the company may not earn $80,000 per annum at the rates fixed—the rates are not necessarily to be lowered because the net income increases.

We submit that Plaintiff's own showing of fact does not justify this or the State Supreme Court in saying that there is confiscation, because neither Court could say "there is no fair or just doubt about the truth of the allegation that the rates are insufficient." *(Willcox* vs. *Gas. Co., supra.)* The case cannot fairly be compared to *Denver* vs. *Denver Union Water Co.*, 246 U. S. 178, where the valuation on which the Court acted "was not seriously disputed," and the return was only 4.28%, or only 3.64% on the Master's valuation.

The State Court had all the facts in this instance before it, knew from the record the circumstances and locality and decided there was no confiscation.

There is no suggestion in the opinion of the State Supreme Court that "no matter what were the facts the findings of the Commission must be upheld if supported by substantial evidence notwithstanding that by the *weight of the evidence these* findings were shown to be incorrect and confiscatory." (Plaintiff's Brief, p. 53).

Let us examine the Supreme Court's comments on the testimony relating to the value of the Neville Island property of the company, which comments are to be found at R Vol. 1, pp. 116, 117, 118.

These comments show that the Court had read and considered the testimony of the plaintiff here; it knew what the land was used for, its extent, location and nature, the title by which it was held, its cost and the estimates of its value made by both parties before the

Commission, as well as the reasons upon which such estimates were founded. In discussing the question of value the Court pointed out the "evidence of *high character*" which had been introduced for the purpose of showing that the land did not have the value contended for by the plaintiff here.

The conclusion of the Court, after reviewing the testimony and pointing out an error of law made by the Superior Court, was that "The Commission had before it testimony as to the actual cost of the Neville Island property, and as we have pointed out, there was *ample evidence* which, if credited by it, tended to show that a supply of similar water could be obtained by putting down wells at almost any point within a considerable area of other property in the vinicity. There was much more testimony which the Commission took into consideration, in fixing the fair value of that portion of the property for rate making purposes, and it does not appear *that any element properly entering* into the value of the Neville Island property was overlooked by the Commission, or that its finding in this respect was *unreasonable* or was based on incomplete evidence, and we can see *no sound reason* for interfering with its judgment in this respect." (Italics ours.)

An examination of the opinion of the State Supreme Court will very clearly show that every contested fact was judicially reviewed by it in the same manner that it reviewed the testimony relating to the value of the Neville Island property. It read the testimony and came to the conclusion that there was ample competent testimony to sustain the Commission's determination; that such determination was not only not confiscatory but was reasonable and that every element of value had been considered correctly by the Commission.

In this connection it may be well to call the Court's attention to the provisions of the Public Service Com-

pany Law relating to the Commission's power and duty in making valuation. These provisions are:

> Section 20 (a), Article V,—"The Commission shall have power, upon application or upon its own motion, to ascertain and determine the fair value of the property of every public service company in this Commonwealth, and to determine any matter in connection therewith; and shall exercise the said power whenever the same is required, or whenever it shall deem such valuation or determination necessary or proper under any of the provisions of this act.
>
> "In ascertaining and determining such fair value, the Commission may determine every fact, matter, or thing which, in its judgment, does or may have any bearing on such value; and may take into consideration, among other things, the original cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance, or other municipal contract, or fixed or proposed by the Commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property, and labor, and the developmental and going concern value of such public service company; and these, and any other elements of value, shall be given such weight by the Commission as may be just and right in each case." (Purdon's Digest, Volume 6, p. 7228.)

We submit that the record in this case shows that the Commission and the Courts of Pennsylvania have definitely determined that the property of the plaintiff is worth $925,000, and that as of the date of the determination an annual return of $65,000 will not confiscate this property.

III.

CONCLUSION.

In view of the fact that the brief of the other Defendants in Error fully discusses the testimony and the conclusions of the Commission and State Supreme Court, on various items of property which the Plaintiff alleges were undervalued, we will not burden the Court with any other reference to them.

We feel sure that the facts justified the Commission in concluding that the value of the property was $925,000 it being a value which was arrived at by considering original cost, reproduction cost and all other elements which were called to the Commission's attention by the testimony and argument. The Supreme Court of the State has found that the Commission did not ignore any element of value and that in its consideration of each of them it was justified by the testimony and has definitely decided that the Commission committed no error of law in arriving at its conclusions. When we consider that the final valuation reached by the Commission at the Supreme Court does not depend upon the reproduction cost new or the original cost alone, but is a determination reached after considering many elements, we feel sure that this Court will agree with the State Supreme Court in saying that the conclusion is not manifestly erroneous and must therefore be sustained.

In this connection we call the Court's attention to the

similarity between the proceeding before the Commission in this case and the proceedings which are arising before the Interstate Commerce Commission under the amendment of March 1st, 1913, to the Interstate Commerce Act. The object of the valuations made under that act seem to us to be the ascertainment of the fair value of the property of the railroads for exactly the same purpose and in exactly the same way as the valuation that was made in this case. The final conclusion by the Interstate Commerce Commission of the value of the property of a common carrier is made prima facie evidence in all judicial proceedings for the enforcement of the act to regulate commerce, and in all judicial proceedings to enjoin, set aside, annul, or suspend any order of the Commission.

37 Stat L., page 701.

We submit that proceedings under this statute will result in the same sort of a determination as the proceedings in this case before the Pennsylvania Commission—that is a judicial determination of the main question, and the only question raised in this case, the value of the property. If, under the act of Congress, the courts are to be called upon to revalue the property of the carriers after the Commission has reached its final determination, the work of that Commission will be practically useless, just as the work of the State Commission will have no beneficial result if a court is to substitute its judgment for that of the Commission.

We submit to the Court that after a valuation of the entire property of the company has been made in the manner in which it was made, in this case, due process of law requires the courts to pass upon that valuation in only one way, namely, by a judicial review of the determination and that in this case the Supreme Court of Pennsylvania made such a review, sustained the Com-

mission's findings and protected all the rights of the Plaintiff in Error.

Respectfully submitted,

BERNE H. EVANS,

Counsel,

For the Public Service Commission of the Commonwealth of Pennsylvania,

Defendant in Error.

FEB 27 192

In the

Supreme Court of the United States

No. 128, October Term, 1919.

OHIO VALLEY WATER COMPANY,
Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH AND AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, AND THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.
Defendants in Error.

Supplemental Brief of The Public Service Commission of the Commonwealth of Pennsylvania, Defendant in Error.

BERNE H. EVANS,
Counsel,
FOR THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

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Supplemental Brief of The Public Service Commission of the Commonwealth of Pennsylvania, Defendant in Error.

Argument.

For the convenience of the Court we reprint the Order for reargument:

"Restored to the docket for reargument. The attention of counsel is directed to the question of whether under the State law the right to review the action of the Commission

was limited by the State statutes to the particular remedy which was here resorted to or whether such statutes left open the right to invoke judicial power by way of independent suit for the purpose of redressing wrongs deemed to have resulted from action taken by the Commission."

In attempting to present our views on the subject to which the Court directs out attention it seems advisable to recall briefly what has taken place in this proceeding.

The Commission, after full hearing and rehearing, fixed the value of the property of the water company as of a fixed date, January 1, 1916; determined the amounts necessary for operating expenses, depreciation and a fair annual return of 7%; and established a schedule of rates to be effective after the aforesaid date.

The company appealed under the provisions of the Public Service Company Law to the Superior Court, an appellate court, and assigned as error the order fixing the rates and a large number of specified determinations of the Commission relating to the fair value of the company's property, alleging, among other things, that its property was confiscated. (R. Vol. 1, pp. 79-87.)

The Superior Court reversed the determination of the Commission, specified in dollars the changes to be made in its valution and sent the proceeding back with an order that the Commission "reform its valuation in accordance with this opinion and upon such valuation it shall fix a schedule of rates which shall cover the expenses, depreciation, etc., and the return per cent. as found by the Commission to be fair." (R. Vol. 1, p. 107). It fixed the fair value of the property of the company, and actually determined what the revenue should be, leaving to the Commission the work of calculation only (Appellant's Original Brief, pp. 10 and 11).

On appeal the Supreme Court reversed the Superior Court, reinstated the order of the Commission, stating that

"A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the Commission upon the question of values, there was merely the substitution of its judgment for that of the Commission, in determining that the order of the latter was unreasonable." (R. Vol. 1, p. 121).

We confidently assert that the entire record shows that the question raised at each step, and now urged in this Court, is "What is the value of the property of this company?" And upon this question the highest State Court has said that the decision of the Commission is lawful, being that of the "appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties." (R. Vol. 1, p. 121)

After this short review of the proceedings we will consider the question raised by this Court, and in so doing we can be of little assistance except in calling attention to the State statutory law and decisions pointing to a theory of interpretation, since we know of no decision of the State Supreme Court directly in point.

I.

THE PUBLIC SERVICE COMPANY LAW RECOGNIZES THE RIGHT OF THE COMMON PLEAS COURT OF DAUPHIN COUNTY BY INJUNCTION TO MODIFY, SUSPEND, STAY OR ANNUAL AN ORDER OF THE COMMISSION, SUBJECT TO AN APPEAL TO THE SUPREME COURT.

The Public Service Company Law provides in Art. VI, Sec. 31, provides as follows:

"Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified *in an appeal or proceeding* taken as provided in this act." *(italics ours)*

(Purdons Digest, Vol. 6, Sec. 7235.)

Since that provision was made in the original Act in 1913 the legislature has twice amended the law relating to reviews of the Commission's actions, but it has not altered the section above referred to.

See Act of June 3, 1915.
Act of July 11, 1917.

The Public Service Company Law also contains the following provision in Art. V, Sec. 29:

"Except as herein otherwise expressly provided none of the powers or duties conferred or imposed by this act upon the commission, and none of the orders, regulations, rules, or certificates made or issued by the commission, and none of the duties, powers or limitations of the powers, conferred or imposed by this act upon public service companies, or the performance or exercise thereof, shall be construed in anywise to abridge or impair any of the obligations, duties, or liabilities of any public service company in equity or under the existing common or statutory law of the Commonwealth; but all such obligations, duties, and liabilities shall be and remain as heretofore. And, except as herein otherwise provided, nothing in this act contained shall in any way abridge or alter the existing rights of action

or remedies in equity or under the common or statutory law of the commonwealth, it being the intention that the provisions of this act shall be cumulative, and in addition to such rights of action and remedies."

Purdon's Digest, Vol. 6, p. 7230.

It would, therefore, seem that the legislature in passing the Public Service Company Law has specifically recognized that in a proper case an injunction may issue to suspend or annual an order of the Commission, limiting the rights of the parties, however, to a bill in the Common Pleas of Dauphin County, that being the County in which the Capitol is situate.

It further specifically preserves all rights of action in equity or at law and declares that the provisions of the Public Service Company Law shall be cumulative except as therein otherwise provided.

Sec. 31, supra, also declares that the orders of the Commission shall be conclusive unless set aside or modified in *an appeal* or *proceeding* taken as provided in the Act, which again seems to contemplate two methods of review—one by appeal and the other by bill in equity.

In the six years since the Public Service Company Law was passed no bill has been filed to annul an order of the Commission, the only equity proceeding being a bill filed against the Commission in 1915 to restrain it from acting. This case, *A. Fischer* vs. *The Commission*, 18 Dauphin Co. Rep. 590, was dropped when the Court of Dauphin County refused the preliminary injunction. We are therefore unable to point to any decision of the highest Court of the State dealing with the powers of the Dauphin County Court to set aside an order of the Commission.

We are unable to agree with the statement of Plaintiff in Error that the Supreme Court of Pennsylvania has decided that the appeal taken by Plaintiff is the only method

by which a review of the Commission's order can be obtained, and we submit that the decisions cited by plaintiff do not so hold.

In the case of *St. Clair Boro* vs. *Tamaqua & Pottsville Elec. Ry. Co.*, 259 Pa. 462, the borough had sought an injunction to restrain the collection of a fare higher than that provided for in an ordinance, and the statements quoted in the Plaintiffs' Brief (p. 39) were made by the Court in sustaining a decree refusing the injunction. The actual decision in no way involved Section 31 of the Public Service Company Law, supra, and neither it nor any other portion of that Act was referred to by the Court as an *exclusive* method of review of the Commission's orders. Naturally, in sustaining the decree, the Supreme Court pointed out the review by appeal to the Superior Court and we call your Honours' attention to the statement that on such appeal "*all questions of law may be raised and determined.*"

Also in *Pittsburgh Rys. Co.* vs. *Pitsburgh*, 260 Pa. 424, (Plaintiff's Supp. Brief, p. 43) there is no justification for the statement that the Dauphin County Court can not grant an injunction to annul a Commision order. The decision goes only so far as to state that the Courts can not adjudicate mattérs within the jurisdiction of the Commission until *after* the Commission has acted, as is shown by the Court's reference on page 426 to the action of the lower Court in discussing "various matters of fact and law, which, while they may prove issues before the Public Service Commission, are not ripe for present consideration—." We think it is clear that the Supreme Court in making the statement that "the courts have no jurisdiction to consider or adjudge *the issues involved until they came to them on appeal*—"(italics ours), was not passing upon Section 31, supra, but was using the word "appeal" in a general sense

—its main idea being that under the law as it now exists no Court can ***adjudicate the issues involved*** prior to action by the Commission.

Similarly in *Klein-Logan Co. vs. Duquesne Light Co.*, 261 Pa. 526, there was no decision on the effect of Sec. 31, supra, the opinion holding simply that where rates and contracts for rates are in question the Commission must be resorted to before the Courts can act. The opinion of the lower Court, affirmed by the Supreme Court, ends with the statement that "the plaintiff can present its claim before the Public Service Commission, and, if denied the right of renewal (of a contract for rates) may then appeal to the courts without prejudice," no determination being made of the Courts to which appeal may be made.

In *Citizens El. Ill. Co.* vs. *Consumers El. Co.* 17 Luzerne Leg. Reg. 413, the question again was as to the right of a Court to inquire, *in the first instance*, into matters within the jurisdiction of the Commission, and the Court's statement that

> "It therefore seems to us to be certain that the purpose of the Legislature was to create a system of single and concentrated supervision in the Public Service Commission over actions taken by public service companies under their several charters and permits obtained from the Public Service Commission, subject to judicial control only upon appeal by the Court of Common Pleas of Dauphin County and under Article VI, Section 30, of the Supreme Court"

was never intended to be an interpretation of Section 31 of the Public Service Company Law, any more than it was a ruling that the appeal provisions constitute a *"judicial* control."

We confidently submit that the State Supreme Court has never had before it, in even the remotest degree, the

question of the right of the Dauphin County Court to restrain the enforcement of an order of the Commission; that it has, therefore, never said that such right does not exist, and that such an interpretation of its decisions can not be justified. In disposing of entirely different questions it has pointed out that matters within the jurisdiction of the Commission can come to the Courts only on appeal, but no fair consideration of the decisions can possibly lead to the conclusion that the highest Court meant that the only review was by the particular appeal followed in this case. In the cases discussed it is evident that the Courts were calling attention to a new practice in Pennsylvania by which questions theretofore adjudicated by the Courts were to be henceforth decided by the Public Service Commission *in the first instance* and by the Courts on review only.

The effect on Section 31, supra, has never been before any Court in the State and has therefore never been decided, but the Section is as much a part of the law as the provisions which authorize the appeal taken by the Plaintiff in this case.

The Plaintiff in Error presumes that we will not dispute its proposition that no other remedy than that granted by the Public Service Company Law was open to it in the Courts of Pennsylvania, (p. 61, Plaintiff's Supp. Brief) and then cites many cases holding that previously existing remedies are abrogated whenever a statutory remedy is created covering the field occupied by them.

The difficulty with the argument seems to us to lie in the fact that the very statute, The Public Service Company Law, which creates the remedy adopted by the Plaintiff recognizes the continuance of at least as effective a remedy in the Dauphin County Court. Equity jurisdiction can hardly be said to be ousted by a statute which specifically provides for it, and we can not, in the absence of decision

by the State Courts on the question, reach any conclusion on this matter except that in a proper case *the Common Pleas Court of Dauphin County can annul an order of the Commission.*

II.

COULD THE REVIEW BY MEANS OF INJUNCTION AND BY MEANS OF THE STATUTORY APPEAL EXIST AT THE SAME TIME?

We state this question because the Plaintiff seems to insist that such a thing can not be (Plaintiff's Supp. Brief, p. 61), and we have suggested that the argument is fallacious because it fails to recognize that the same Act provides for both remedies.

And in this connection the Court's attention is called to the statutes and decisions in Vermont.

In that State the Public Service Commission is given many powers like those exercised by the Pennsylvania Commission and they are invoked and executed in practically the same way.

Laws of Vermont 1906, No. 126; 1908, No. 116.

The appeal from an order of the Commission in that State is to the Supreme Court "for the correction of any error excepted to in its (Commission) proceedings, or in the form or substance of its orders, judgments and decrees on the facts found by the Commission." (Pub. Stats. Vt. 1906, Sec. 4599).

The law then provides for decision by the Supreme Court as follows:

> "Appeals from commission shall be taken and the cause entered in the supreme court in the county where the cause arises, in the manner and under the law and rules of procedure which govern such appeals from the court of chancery. The supreme court shall have the same power therein as it has over appeals from such court. It may reverse or affirm the judgments, orders or decrees of commission and may remand a cause to commission with such mandates as law or equity shall require; and commission shall enter judgment, order or decree in accordance with such mandates. Such appeal shall not vacate any judgment, order or decree of commission, but the supreme court or, when not in session, a judge thereof, may suspend execution of the same as justice and equity require, unless otherwise specifically required by law."
>
> (Pub. Stats. Vt. 1906, Sec. 4600.)

This legislation has been before both the State Supreme Court and this Court, and the decisions seem to have a bearing on the question of the nature of the review provided and the existence of two methods of review. In *Sabre vs. Rutland R. Co.*, 85 Atl. 693, the constitutionality of the Act was attacked for want of a provision for a judicial review of the orders of the Commission, and the Supreme Court of the State said (p. 702)

> "Under the statute providing for appeals, the party upon whom an order is made may, if it pursues the orderly and not burdensome course pointed out by the statute, present to this court the questions of the propriety of the rulings of the commission in receiving or excluding evidence, the sufficiency of the evidence to sustain the findings under the rule which obtains in this state that a mere scintilla of evidence will not sustain a finding, and the question of the sufficiency of the findings to warrant the order under the rule that the order must not be unreasonable or arbitrary in its character, and that it must bear some just relation to some reasonable purpose with a view to which authority to make it was conferred.

> Moreover, the rights of a party are not necessarily limited to those which he may secure by an appeal. Section 4, c. 2, of our Constitution, providing that "the courts shall be open for the trial of all causes proper for their cognizance," means, among other things, that by a proper proceeding the question of whether an administrative body has exceeded its powers may be brought before and determined by the established courts."

And in *Bacon* vs. *Boston & M. R. R.*, 76 Atl. 128, the same Court at p. 143 disposed of a contention that its appellate power made it an appellate Public Service Commission; so that we have the State Supreme Court holding that it judicially reviews the determinations of the Commission, and that the particular judicial review provided by the Public Service Company Law is not the only judicial review; this last being in spite of the fact that no other review is provided by *statute,* while in Pennsylvania we have the specific declaration of Section 31 above quoted. In addition our State Constitution contains a declaration very similar to that of Vermont, i. e.

"All Courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law——"

Art. I, Sec. XI, Cons. of Pennsylvania; Purdon's Digest, Vol. 1, p. 130.

These points having been decided by the highest Court of the State, the question came to this Court in *Bacon* vs. *Rutland R. Co.*, 232 U. S.; 136, L. Ed. 538, where the opinion by Mr. Justice Holmes, after quoting the Vermont statutes, says:

> "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the Court. *They only provide an alternative and more expeditious way of doing what might be done*

> ***by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not if exceptions are taken (which does not appear in this case) is immaterial;*** the remedy in either event is purely judicial, to exonerate the appellant from an order that exceeds the law. This we understand is the view taken by the supreme court of the State, (Bacon vs. Boston & M. R. R., 83 Vt. 421, 76 Atl. 128) Sabre vs. Rutland R. R., 86 Vt. 347, 85 Atl. 693; and this being so, by the rule laid down in Prentis vs. Atl. Coast Line Co., the railroad company was free to assert its rights in the district court of the United States." (Italics ours).

We submit that the decision of the Pennsylvania Supreme Court in this case holds that the appeal from the Commission's order must be reviewed "under the laws and rules of procedure that govern appeals from the court of chancery" and that such was precisely the review that it gave in this case. As Mr. Justice Holmes said it is immaterial whether the alternative (review by injunction in Dauphin County) is exclusive or concurrent or whether it would open up new matters; the existence of two reviews, one by appeal and the other by bill, has been recognized by this Court.

III.

IN THE ABSENCE OF DECISIONS BY THE STATE COURT ON THE EFFECT OF SECTION 31 OF THE PUBLIC SERVICE COMPANY LAW, THIS COURT WILL PRESUME, AND THE RECORD SHOWS, THAT THE STATUTORY APPEAL SUBMITTED TO THE STATE SUPREME COURT THE QUESTION IT WAS AUTHORIZED TO ENTERTAIN—WHETHER THE ORDER OF THE COMMISSION WAS "IN CONFORMITY WITH LAW."

We have pointed out that the Act under which Plaintiff was incorporated provided for the regulation of its rates by a Court of Equity, subject to review by the Supreme Court. (P. 14. Original Brief of Public Service Commission) and that this review was a judicial one: further that the power exercised by the Court of Equity had been taken from it and lodged in the Commission by the Public Service Company Law. Under the old practice the appellate court had always reviewed the Chancellor's findings judicially; it had viewed the questions exactly in the way suggested by Mr. Justice Holmes when he was Chief Justice of the Supreme Judicial Court of Massachusetts in *Janvrin* vs. *Revere Water Company,* 174 Mass. 514; 55 N. E. 381. It seems to us that the Pennsylvania Supreme Court had, on appeal, treated the Chancellor's determination of facts as "a judicial investigation in aid of legislative regulation," and has so looked upon the Commission's findings in this case. This seems to be admitted by the Plaintiff in Error by its statement in its Original Brief, page 117, that the State Supreme Court "confined the Superior Court to the procedure characteristic of an appeal from a judicial decision," and in its Supplemental Brief at page 60 that "the Superior Court on appeal from the Commission is a court acting judicially."

Under the Constiution of Pennsylvania the Supreme Court can not act except judicially, since it is provided in Article V, Section 21, that

> "No duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial—."

Purdon's Digest, Vol. 1, page 181.

Therefore, even if the Plaintiff in Error is right in its contention here, which we deny because of the positive provision of Section 31, supra, and the fact that the highest

Court of the State has never passed on it, is not the situation very similar to that passed upon by this Court in *Napa Valley El. Co. vs. Rail Road Com. of California,* decided January 19, 1920, and not yet reported?

It seems to us that Your Honours in that case approve a system of regulation and review thereof which provides

(1) For complaint to a Commission identical with that in Pennsylvania.

(2) Appeal from the Commission's order direct to the highest State Court, which acts judicially on the record of the Commission, whose findings are final.

(3) That no State Court, except the Supreme Court, shall have jurisdiction to review or annul an order of the Commission.

Irrespective, therefore, of the effect which may finally be given by the Pennsylvania Courts to Section 31 of the Public Service Company Law, we call the Court's attention to the decision in this case and, at the risk of repeating matters fresh in Your Honour's minds we will trace the litigation in California.

The *Napa Valley* case was here on an appeal from the decree of the United States District Court refusing an injunction to restrain the enforcement of an order of the California Commission regulating rates. The injunction was asked for under section 237 of the Judicial Code (Comp St. sec. 1214) on the allegation that the Commission's order was in violation of the Fourteenth Amendment to the Federal Constitution.

The bill alleged:

> "That thereafter, and on the 20th day of June, 1917, your orator duly filed in the Supreme Court of the state of California its petition for a writ of review, asking and praying that a writ of review

issue out of said court, commanding said Railroad Commission to certify to said court, on a day named in said writ a full and complete record of all the proceedings leading up to the making of said order and decision dated May 21, 1914, together with said order and decision and your orator's application for a rehearing thereof, and also a full and complete record of all the proceedings leading up to the making of said order and decision dated November 15, 1916, together with said order and decision and orator's application for a rehearing thereof, and that upon the return of said writ, said orders and decisions of the said Railroad Commission be reversed and vacated and annulled, upon the ground that said orders and decisions violate the rights of your orator under the Constitution of the United States, and more particularly its rights under section 10 of article 1 thereof, and under section 1 of article 14 of the Amendments thereto; that the said Supreme Court of the state of California denied your orator's said petition for a writ or reviw, and refused to issue a writ of review, as prayed for in said petition."

In deciding this case Judge Van Fleet said:

"As the terms of the statute clearly import, the review there contemplated is strictly a judicial one, before the court sitting in its capacity as a judicial tribunal, limited to a consideration of the purely legal aspects and propriety of the act of the commission under review, and not, as in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, as a part of the rate-fixing power of the State. Detroit & Mackinac R. Co. v. Michigan Railroad Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288; Palermo Land & Water Co. v. Railroad Commission of California et al. (D. C.) 227 Fed. 708.

"Under this statute, when plaintiff's petition for rehearing was denied, the legislative history of the orders complained of was complete; the final step to make them effective having been taken. The question of their validity then became a justiciable one, and plaintiff could at once proceed to test that question in the courts. Palermo Land & Water Co. vs. Railroad

> Commission, supra. For that purpose plaintiff was at liberty to proceed either in the state court, as it did, or in this court, since the state statute, even if so intended, could not restrict or abridge its right to invoke the jurisdiction of the latter court in any case falling within its jurisdiction. It chose to present its case to the state court, and, as we have seen, upon the same questions of right as those presented here. That court was in all respects as competent and as much under obligation to protect those rights, constitutional or otherwise, as this court, and it will, of course, be presumed that it kept that obligation in view in passing upon plaintiff's application."

Napa Valley Electric Company vs. Railroad Commission, 257 Fed. 197.

The proceeding before the State tribunals in the *Napa Valley* case and in the *Ohio Valley* case are so similar that they should be called to the Court's attention.

In each case the Commissions after public hearings upon complaints, found the value of the property, operating expenses, depreciation, and rate of return and then established rates. Each company asked for a rehearing and then appealed from the determination of the Commission—in California the writ of review was refused, in Pennsylvania the highest Court actually reviewed the proceedings. Before both Commissions and before the highest Courts of each State the Companies alleged a violation of the Fourteenth Amendment.

See: *Calistoga Electria Company* vs. *Nappa Valley Electric Company,* 4 California Railroad Commission Reports, 1061; *Calistoga Electric Company* vs. *Napa Valley Electric Company,* 11 California Railroad Commission Reports, 974; *Napa Valley Electric Company* vs. *Railroad Commission,* 257 Fed. 197.

When we keep in mind that the District Court and this Court have said that in the California case the company

had a judicial review of the determination on its appeal to the State Supreme Court it becomes important to examine the State statutes covering reviews of the decisions of the Railroad Commission and the State decisions on that statute.

The portion of the Public Service Company Law of California relating to review of the Commission's orders is section 67 of Stat. Cal. Extra Session 1911, p. 18, 55, the material parts being as follows:

> "The applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a Writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such Writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the Commission to certify its record in the case to the court."
>
> * * * * * *
>
> "No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the com-

> mission. The provisions of the code of civil procedure of this state relating to Writs of review shall so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties; provided, that the Writ of mandamus shall lie from the supreme court to the commission in all proper cases."

The Supreme Court of California has decided that under this Act it has no power to revise the order of the Commission and substitute such order as the Court believes to be reasonable, precisely what the Pennsylvania Supreme Court said could not be done in this case. It further holds that its review of the Rail Road Commissions' orders is judicial only.

Pacific T. & T. Co. vs. Eshleman, 166 Cal. 640.

San Joaquin L. & P. Co. vs. R. R. Com., 175 Cal. 74.

In passing upon the refusal of the Federal District Court to grant an injunction in the *Napa Valley* case, supra, this Court recognized that on an appeal under these conditions the State Supreme Court had submitted to it "the questions it was authorized to entertain—whether the Commission 'pursued its authority, including a determination of whether the order or decision' violated 'any right' of the company 'under the constitution of the United States or the State of California.'" As Judge Fleet said in the District Court:

> "As the terms of the statute clearly import, the review there contemplated is strictly a judicial one, before the court sitting in its capacity as a judicial tribunal, limited to a consideration of the purely legal aspects and propriety of the act of the commission

under review, and not, as in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup Ct. 67, 53 L. Ed. 150, as a part of the rate-fixing power of the State. Detroit & Mackinac R. Co. v. Michigan Railroad Commission, 235 U. S. 402, 36 Sup. Ct. 126, 59 L. Ed. 288; Palermo Land & Water Co. v. Railroad Commission of California et al. (D. C.) 227 Fed. 708."

IV.

CONCLUSION.

The decision in this case and the other cases we have cited seem to us to be authorities for these propositions:

(a) A State may provide for a Commission to regulate rates, make its determination of facts final and subject to judicial review on the record alone, without violating the due process clause of the Constitution.

Napa Valley El. Co. vs. R. R. Com., supra.

(b) A State may provide an appeal from the Commission's decision in which the Appellate Court shall have the same power as it has over appeals from a court of chancery without violating the due process clause.

Bacon vs. Rutland R. Co., supra.

(c) Such an appeal is purely judicial, confers no legislative power, and it is immaterial whether it is exclusive or concurrent with some other remedy.

Bacon vs. Rutland R. Co., supra

(d) In enacting a system of regulation it is not essential that there be a right to invoke judicial power by way of independent suit, provided that after the legislative act is complete its conformity with law can be submitted to a judicial review upon a record made after notice and hearing.

Napa Valley El. Co. vs. R. R. Com., supra.
Prentis vs. Atl. C. L. R. R., 211 U. S. 210.
Detroit & Mackinac R. Co. vs. Com., 235 U. S. 402.

We respectfully submit that the Supreme Court of Pennsylvania in this case has said no more than that the Courts in reviewing the Commission's action must act judicially and give the review which they would give to an appeal from a court of chancery; that the State Court has never passed on the provision authorizing an injunction to annul a Commission order, and that, while we believe the law provides two methods for reviewing such an order, that fact is not essential to the constitutionality of the Act.

Respectfully submitted,

BERNE H. EVANS,
Counsel.

FOR THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

MAR 2 1920
JAMES D. BAKER

IN THE

SUPREME COURT OF THE UNITED STATES

No. 128 OCTOBER TERM, 1919.

OHIO VALLEY WATER COMPANY, Plaintiff in Error,

vs.

BEN AVON BOROUGH, McKEES ROCKS BOROUGH, BELLEVUE BOROUGH, AVALON BOROUGH, TOWNSHIP OF STOWE, WEST VIEW BOROUGH, WILLIAM B. DAWSON, and THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, Defendants in Error.

Additional Brief of Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough and William B. Dawson, Defendants in Error, on Re-Argument.

DAVID L. STARR,
ALBERT G. LIDDELL,
LEONARD K. GUILER,
Attorneys for Defendants in Error.

James McMillin Printing Company, Penn Ave. and Barbeau St., Pittsburgh, Pa.

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CONTENTIONS OF THE PARTIES.

Counsel for plaintiff in error in their original brief contended that the plaintiff in error had been deprived of its property without due process of law by the order of the Public Service Commission of Pennsylvania, reinstated by the Supreme Court. They claimed to have had a judicial investigation in the Superior Court of

Pennsylvania of the question whether the valuation placed upon the property of the plaintiff in error by the Commission was too low, and contended that the judgment of the Supreme Court of Pennsylvania reversing the Superior Court and reinstating the order of the Commission, had deprived the plaintiff in error of its property without due process of law by denying it a proper hearing upon the question of confiscation.

We contended that the fair value of the property of the plaintiff in error, as found by the Commission, was judicially determined by the Supreme Court of Pennsylvania to be supported by the evidence and that the Commission's order was reasonable and in conformity with law.

We conceded that the plaintiff in error was entitled to a judicial inquiry as to whether the order of the Commission deprived it of its property without due process of law but maintained that it had had a judicial inquiry of this question in the Supreme Court of Pennsylvania and that the question of the powers of the Superior Court on an appeal from an order of the Commission had nothing to do with this case.

In their original Brief (P. 31) counsel for plaintiff in error state their contention as follows:

> "The effect of the Public Service Company Law as thus construed was to deprive the Water Company of its property without due process of law by denying it a *proper hearing* upon the question of confiscation."

It will be noted therefore that the ground of complaint is not the denial of a hearing on the question of confiscation but a denial of a "proper hearing."

In support of this assertion it was contended for plaintiff in error that the Supreme Court of Pennsylvania did not examine the facts further than to ascertain whether there was substantial testimony to sustain the findings of the Commission which contention we claimed was effectually refuted by a mere reading of the opinion of the Supreme Court. It was further contended that the plaintiff in error did not have a "proper hearing" because the construction placed upon the Public Service Company law by the Supreme Court, "confined the Superior Court to the procedure characteristic of an appeal from a judicial decision" (P. 117), and deprived it of "the freedom which it would have under a bill in chancery" (P. 127).

When the plaintiff in error appealed to the Superior Court from the order of the Commission it knew that under Sections 22 and 24 of the Public Service Company law the Superior Court had jurisdiction to determine, upon the record certified to it by the Commission, whether or not the order appealed from was reasonable and in conformity with law, and that it could do one of three things, viz: dismiss the appeal and affirm the order of the Commission, enter a final decree reversing the order of the Commission, or, in its discretion, remand the record to the Commission, with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.

These powers of the Superior Court as limited and defined by the Public Service Company law, the plaintiff in error sought to amplify and enlarge by judicial construction in the Supreme Court of Pennsylvania and in

this Court, but the Supreme Court of Pennsylvania refused to confirm the Superior Court in the latter court's construction of its powers on an appeal from an order of the Commission.

UNDER THE PUBLIC SERVICE COMPANY LAW THE RIGHT TO REVIEW THE ACTION OF THE COMMISSION WAS NOT LIMITED TO THE REMEDY BY APPEAL TO THE SUPERIOR COURT.

Under the Constitution of Pennsylvania, the title of an Act of Assembly is a part of the Act; it limits its scope and is properly used in interpreting its words.

Pa. R. R. vs. Riblet, 66 Pa., 164 (P.169).
Perkins vs. Phila., 156 Pa., 554 (P. 558).

The title of the Public Service Company law of 1913 (*Pa. Laws,* page 1374), provides (*inter alia*) as follows:

> AN ACT, Defining public service companies; and providing for their regulation by prescribing and defining their duties and liabilities, * * * creating and establishing a Public Service Commission for the regulation aforesaid; * * * prescribing and regulating the practice and procedure before such commission, and upon appeal and judicial review of its orders and determinations by the court of common pleas; and giving the court of common pleas of Dauphin County exclusive jurisdiction of such appeals in certain cases, and of all injunctions, mandamus, or other appropriate proceedings to enforce the provisions of this act and

the orders of the commission, and to *restrain such orders,* subject to an appeal to the Supreme Court; * * * (Italics ours.)

Sect. 31 of Article VI (*Pa. Laws,* 1913, P. 1429; *Purdon's Digest,* Vol. 6, P. 7235, Sect. 175), provides as follows:

> Section 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the Commission, or of a commissioner, except upon notice to the Commission and after cause shown upon a hearing. The Court of Common Pleas of Dauphin County is hereby clothed with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the Commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act.

The last paragraph of Section 29 of Article V of said Public Service Company Law (*Pa. Laws,* 1913, P. 1419; *Purdon's Digest,* Vol. 6, P. 7230, Sect. 137), provides as follows:

> And, except as herein otherwise provided, nothing in this act contained shall in any way abridge or alter the existing rights of action or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this act shall be cumulative, and in addition to such rights of action and remedies.

Sect. 36 of Article 6 of said Act, as amended by the Act of June 3, 1915, P. L., 779 (P. 785), *Purdon's Digest*, Vol. 6, P. 7236, Sect. 181, provides as follows:

> Each and every day's continuance in the violation of any final direction, requirement, determination, or order of the commission, or of any final judgment, order or decree made by the Superior Court or by the Supreme Court, shall be a separate and distinct offense. Provided, however, that if any interlocutory order or supersedeas or a *preliminary injunction be granted*, no penalties shall be incurred or collected for or on account of any act, matter, or thing done in violation of such final direction, requirement, determination, or order, or decree, so seperseded or *enjoined*, for the period of time such order or supersedeas or *injunction* is in force. (Italics ours.)

Under this provision of the law, plaintiff in error, instead of appealing to the Superior Court, might have filed a bill in equity in the Court of Common Pleas of Dauphin County, at Harrisburg, to restrain the Commission from putting into effect its alleged confiscatory order.

In the Court of Common Pleas of Dauphin County plaintiff in error would have found a court with exclusive jurisdiction throughout the Commonwealth of all proceedings for such injunctions, and with power to modify, suspend, stay or annul any order of the Commission after cause shown upon hearing, with only one condition,—notice to the Commission.

In this tribunal plaintiff in error might have invoked the jurisdiction of a court with "the freedom

under a bill in chancery," which it claims the Superior Court was deprived of by the Supreme Court.

There is no decision of the courts of Pennsylvania holding that a party affected by an order of the Commission may not invoke this remedy by injunction in the Dauphin County Court.

The language of the section quoted recognizes the alternative remedy in providing that any rule, regulation, finding, determination or order of the Commission shall be and remain conclusive, "unless set aside, annulled, or modified in an *appeal* or *proceeding* taken as provided in this act."

The argument that the only remedy open to the plaintiff in error was an appeal to the Superior Court has no foundation in fact.

Section 31 of the Public Service Company law, above quoted, has never been construed by the Supreme or Superior Courts of Pennsylvania in any reported case.

This Court will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution.

> *Mountain Timber Co. vs. Washington,* 243 U. S., 219 (p. 246).

The first case arising under the Public Service Company law of 1913, was *Bellevue Borough vs. Ohio Valley Water Co.,* 245 Pa., 114, since which time the Supreme Court has consistently held that matters within the jurisdiction of the Public Service Commission must

first be determined by it, in every instance, before the courts will adjudge any phase of the controversy.

In *St. Clair Boro. vs. Tamaqua & P. E. Ry. Co.*, 259 Pa., 462 (P. 468), the Supreme Court said:

> "Under the established system the Commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well regulated review by the courts, where and when all questions of law may be raised and determined."

In *Pittsburgh Rys. Co. vs. Pittsburgh*, 260 Pa., 424 (P. 427):

> "Since the act just mentioned (the Public Service Act) has become part of our statute law, in cases such as the one at bar, the courts have no jurisdiction to consider or adjudge the issues involved until they come to them on appeal, and even then their powers are restricted by the limitations of the act and the established relevant rules governing the review of facts by appellate tribunals." (Citing cases.)

It is manifest that what the Supreme Court was speaking of in the above case, was appeals to the Superior or Supreme Court from orders of the Commission because it refers to the "rules governing the review of facts by *appellate* tribunals."

There is no basis for the argument that by the general language of this opinion the Supreme Court meant to hold that a bill in equity would not lie in the Dauphin County Court to restrain the Commission from putting into effect an alleged confiscatory order.

It might with equal reason be used as a basis for an argument that a party might not appeal to the court of common pleas and demand a jury trial, where property is taken, injured or destroyed under Sect. 8 of Article 16, of the Constitution of Pennsylvania, as provided by Article VI, Sect. 29 of the act, as amended by the Act of June 3, 1915, P. L., 779 (*Purdon's Digest,* Vol. 6, P. 7233, Sect. 158), and yet the Supreme Court particularly referred to this form of appeal in its opinion in the case of *St. Clair Boro. vs. Tamaqua & P. E. Ry. Co.*, 259 Pa., 462 (P. 467).

In the case of *Klein-Logan Company vs. Duquesne Light Company,* 261 Pa., 526, the Court of Common Pleas of Allegheny County refused to enjoin an electric company from terminating a contract, on the ground that the question was properly one for the Public Service Commission in the first instance.

The decree of the lower Court was affirmed *Per Curiam* by the Supreme Court.

The lower Court said in its opinion (P. 528):

> "The Public Service Law of 1913 gives the Public Service Commission exclusive jurisdiction, in the first instance, to inquire into and regulate the service, rates, fares, tolls and charges of any and all public service companies. The courts of Pennsylvania no longer have jurisdiction except upon appeal from a determination by the Public Service Commission."

This case decides nothing more than that a bill in equity will not lie in the Common Pleas Courts where the question is one for the Public Service Commission

to decide in the first instance, but it does not decide that an appeal might not be taken to the Court of Common Pleas of Dauphin County by bill in equity for injunction to restrain the Commission from putting into effect an alleged confiscatory order.

It is therefore submitted that under the Pennsylvania Public Service Company law, as construed by the Supreme Court:

1. The Commission in the first instance passes upon all questions within its jurisdiction.

2. The courts will not adjudge any phase of the controversy until the Commission has made an order or determination.

3. If the order is for reparation or damages, the person to whom payment is directed to be made may sue therefor in any Court of Common Pleas of the Commonwealth. (Art V, Sect. 5; *Purdon's Digest,* Vol. 6, P. 7223, Sect. 95, 96, 97.)

4. If the order is an award of damages or compensation by the Commission, where the party is entitled to a jury trial, the appeal shall be to the courts of the proper county. (*Purdon's Digest,* Vol. 6, P. 7233, Sect. 158), Act 1915, P. L., 779, Sect. 3.

5. In all other cases an appeal from an order of the Commission may be taken to the Superior Court (Sect. 3, Act 1915, above), which Court under Art. VI., Sect. 22 of the act shall determine whether the order appealed from is reasonable and in conformity with law.

6. Upon the hearing of such an appeal the Superior Court may not substitute its judgment for that of the Commission on the question of values, in fixing the fair

value of the property for rate making purposes. *Ben Avon Boro. vs. Ohio Valley Water Co.,* 260 Pa., 289 (P. 309).

7. Instead of appealing to the Superior Court, a party affected by an order of the Commission may file a bill in equity for injunction in the Court of Common Pleas of Dauphin County, which court has exclusive jurisdiction of all proceedings for such injunctions, and may modify, suspend, stay or annul the order of the Commission. (Act VI, Sect. 31, *Purdon's Digest,* Vol. 6, P. 7235, Sect. 175.)

8. From a decree of the Superior Court or the Dauphin County Court, an appeal may be taken under certain conditions, to the Supreme Court, which Court "may enter such judgment, order or decree as may be just." Act 1913, Sect. VI; Art. 31, Act 1917, P. L., 808; Act 1895, P. L., 212; Act 1891, P. L., 101 (*Purdon's Digest,* Vol. 2, PP. 1439-1444).

NO FEDERAL QUESTION IS INVOLVED IN THIS CASE.

It should be kept in mind that in deciding this case the Supreme Court of Pennsylvania was performing two functions:

1. It was construing the powers of the Superior Court on an appeal from an order of the Commission, under the provisions of the Public Service Company law.

2. It reviewed the testimony on the items of value that were in dispute, bearing on the fair value of the property of the plaintiff in error, and determined that

the findings of fact by the Commission were based upon competent evidence, were reasonable, that no abuse of discretion had been shown and that in no instance were they arbitrary and not in conformity with law.

The first question was purely one of state law and consequently presents no Federal question. The state court's decision is controlling. *Preston vs. Chicago,* 226 U. S., 447; *Enterprise Irrig. Dist. vs. Farmers Mutual Canal Co.,* 243 U. S., 157.

The second question may have involved in its determination a Federal question which would move this court to "enter upon such an examination of the record as may be necessary to determine whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission, as to deny the invoked constitutional right to due process of law."

People Ex Rel. New York & Q. Gas Co. vs. McCall, 245 U. S., 345.

Even if the contention of the plaintiff in error were true, that the Supreme Court held it would not examine the facts further than to determine whether there was substantial evidence to sustain the order of the Commission, which we deny, yet if the plaintiff in error might have invoked the jurisdiction of the Dauphin County Court, where upon hearing the disputed facts might have been inquired into, it cannot be said that the decision of the State Supreme Court necessarily involved a Federal question.

It is therefore submitted that the judgment of the State Supreme Court may be sustained on the ground that no Federal question was involved, its decision

resting upon the right of that court to determine what construction should be given to the provisions of the state law relative to appeals to that court and the Superior Court from orders of the Commission, and the plaintiff in error having had the choice of another proceeding in another court if it desired a different form of review of the Commission's order.

This Court will not assume that if plaintiff in error had resorted to the Dauphin County Court the latter court would not have granted relief, if the order of the Commission was confiscatory, as alleged.

> "The duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified."
>
> *Mellon Co. vs. McCafferty,* 239 U. S., 134.

If this contention is sustained, then this appeal should be dismissed for want of jurisdiction in this Court.

> *Enterprise Irrig. Dist. vs. Farmer's Mutual Canal Co.,* 243 U. S., 157.

The effect and operation of the Public Service Company law of Pennsylvania, as put in force by the state, has not deprived the plaintiff in error of its property without due process of law, and that is the sole question with which this Court is concerned.

> *Corn Products Refining Co., vs. Eddy, U. S. Adv. Ops.,* 1918-1919, page 398 (P. 401).

Plaintiff in error is in exactly the same position as it was before the passage of the Public Service Company law, with the single exception that it must file and post a schedule of its rates or any increase thereof with the Commission.

Under the Act of April 29, 1874, under which the plaintiff in error was incorporated (Clause 7, Sect. 34, *Purdon's Digest*, Vol. 2, p. 1789), the Court of Common Pleas of the proper county had jurisdiction and power, upon the bill or petition of any citizen using the water of said company, to hear, inquire and determine as to charges for water so furnished and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process.

This section of the law was repealed by the Public Service Company law (*Purdon's Digest*, Vol. 6, p. 7238), and this power was held by the Supreme Court in *Bellevue Boro. vs. Ohio Valley Water Co.*, 245 Pa., 114 (P. 116), to be vested in the Commission in the first instance.

It will be noted that it was the plaintiff in error that contended for the principle decided in above case, and having secured the decision, it then sought by judicial construction to vest in the Superior Court the powers formerly exercised by the Court of Common Pleas, and this despite the fact that the Court of Common Pleas of Dauphin County, had jurisdiction under the Public Service Company law to modify, suspend, stay or annull the order of the Commission as to rates which power was no more nor less than the Court of

Common Pleas of the proper county had under the Act of 1874, as to rates fixed by a water company.

We repeat, the plaintiff in error has been deprived of no right of judicial inquiry which it did not have before the passage of the Public Service Company law, but the consumer of its water is removed one step from the courts, by being compelled to file a complaint with the Commission on the question of reasonableness of rates fixed by the water company and have the matter determined by the Commission before the jurisdiction of the courts can be invoked.

On page 53 of their Brief on re-argument, counsel for plaintiff in error suggest two imaginary instances in which provisions of Section 31 of Article VI might apply and afford the only remedy. But why indulge in speculation on this point? The question to be determined is whether this remedy in the Dauphin County Court was open to the plaintiff in error.

On page 43 they argue:

> "The language of the statute is throughout the language of appeal, but the effect of it is to provide for original judicial jurisdiction, once in the Dauphin Common Pleas, now in the Superior Court, and appellate judicial jurisdiction in the Supreme Court. * * * It is 'on appeal' (and it would seem, only on appeal) that questions of law involved in an order of the Commission may be raised and determined."

And here lies the fundamental difficulty with the case of the plaintiff in error,—the attempt to give the

Superior Court "original judicial jurisdiction," of a kind different from that defined in the state law as construed by the Supreme Court.

There is no complaint in this case that the Superior Court did not have authority to determine questions of law.

Certainly there is nothing in the opinion of the Supreme Court which denied such power in the Superior Court.

The only ground of complaint was that the fair value of the property of the plaintiff in error as found by the Commission was too low and therefore confiscatory; that the Supreme Court refused to permit the Superior Court to weigh the evidence and substitute its opinion on the question of values for that of the Commission, which it was claimed amounted to a denial of a "proper hearing" on the question of confiscation.

In the recent case of *Napa Valley Elec. Co. vs. Board of R. R. Com., U. S. Adv. Ops.*, 1919-20, P. 202, decided January 19, 1920, No. 401, this court in an opinion by Mr. Justice McKenna, referred to Sect. 67 of the California Public Utilities Act as follows (P. 204):

> "The contention is based on § 67 of the Public Utilities Act of the state. The section is too long to quote. It is part of the procedure provided by the state for the execution of its policy in regard to the public utilities of the state, and affords a review of the action of the Commission regulating them. It is quite circumstantial and explicit. It provides for a review of the action of the Commission by writ of *certiorari* or review from the Supreme Court of the state, which 'shall direct the Commission to certify its record in the case to the

court,' the cause to 'be heard on the record of the Commission as certified by it.' No other evidence is to be received, and the review is confined to an inquiry 'whether the Commission has regularly pursued its authority' or whether its order or decision 'violates any right of the petitioner under the Constitution of the United States or of the state of California.' The findings and conclusions of the Commisison on questions of fact are to be final. The Commission and the parties have the right of appearance, and upon the hearing the court 'shall enter judgment either affirming or setting aside the order or decision of the Commission.' The Civil Code of the state is made applicable so far as it is not inconsistent with the prescribed proceedings, and no court of the state except the Supreme Court to the extent specified shall have jurisdiction over any order or decision of the Commission except 'that the writ of *mandamus* shall lie from the Supreme Court to the Commission in all proper cases.' "

If such procedure in the abstract, affords a review of the action of the Commission, plaintiff in error has no cause for complaint of the procedure for such review provided by the Pennsylvania Public Service Company Law, which authorizes an appeal to the Superior Court or bill for injunction in the Dauphin County Court and an appeal from either Court to the Supreme Court.

On page 51 it is asserted that: "If there be no other available or adequate remedy to enforce a right, it (injunction) may be resorted to. But when the common law or a statute has already provided a remedy appropriate to the exigency, it must be followed and the extraordinary remedy by injunction is not open." * * * "Now, there was in the case at bar an appropriate rem-

edy—by appeal to the Superior Court, therefore there was no right to an injunction,"—yet the sole ground of complaint in this case is that the remedy by appeal as construed by the Supreme Court did not afford a proper hearing on the question of confiscation.

If the remedy by appeal was available, adequate and appropriate, the question whether there was an optional or concurrent remedy in the Dauphin County Court becomes unimportant.

But if the remedy by appeal was inadequate because the Superior Court had no power to substitute its judgment for that of the Commission on questions of value, then "the very corner-stone of equity jurisdiction exists," a wrong for which no adequate remedy has been provided.

Again counsel for plaintiff in error assert (P. 51) that injunction "is a remedy of equity. It is a remedy, to use the old phrase, of grace and not of right."

For upwards of thirty years at least, this old phrase has had no place in the equity jurisprudence of Pennsylvania.

In *Walters vs. McElroy et al.*, 151 Pa., 549 (1892), the Supreme Court said (P. 557):

> "The phrase 'of grace' predicated of a decree in equity had its origin in an age when kings dispensed their royal favors by the hands of their chancellors, but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are

administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace of the chancellor. Certainly no chancellor in any English speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiae*, and needs not to be implored *ex gratia*."

That no litigant in any reported case has ever invoked the jurisdiction of the Dauphin County Court to restrain the enforcement of an order of the Commission, indicates nothing more than an agreement with the plaintiff in error, that the remedy by appeal is adequate and appropriate.

But the remedy by injunction is recognized and provided for by the act and the Dauphin County Court is given exclusive jurisdiction thereof.

The Act of March 21, 1806, cited by counsel for plaintiff in error, providing "that in all cases where a remedy is provided or duty enjoined, or anything directed to be done by any act or acts of Assembly of this commonwealth, the directions of the said acts shall be strictly pursued," * * * has no bearing on the question, for the reason that both the remedy by appeal to the Superior Court and the remedy by injunction in the Dauphin County Court are "provided" by the Public Service Company law. The Act would be "strictly pursued" by adopting either "remedy provided."

We do not understand why counsel for plaintiff in error consider it necessary to discuss the general equity

powers of the courts of common pleas in Pennsylvania, as provided by the Act of June 16, 1836.

The jurisdiction of the Dauphin County Court to issue an injunction modifying, suspending, staying, or annulling any order of the Commission is found in Sect. 31 of Article VI of the Public Service Company law and does not arise under any general equity powers conferred by the Act of 1836 or any other Act.

This exclusive jurisdiction of that court cannot be argued away by quoting from decisions bearing upon the general equity powers of all the common pleas courts of Pennsylvania or by asserting that the remedy by appeal was appropriate and adequate and then appealing to this court on the ground that the latter remedy did not afford a proper hearing on the question of confiscation.

The plain words of the statute admit of only one construction.

The Superior Court on appeal has *authority* to determine from the record whether the order was *reasonable* and in *conformity with law*, and to *affirm* or *reverse* the *order*, or *remand* the *record*.

The Dauphin County Court has *exclusive jurisdiction* of all *proceedings* for *injunctions* with *power* to *modify*, *suspend*, *stay* or *annul* any *order* of the Commission, upon notice to the Commission, after cause shown upon a hearing.

In conclusion, we frankly state we were and are willing to rest our case upon the opinion of the Supreme Court of Pennsylvania, believing as we do, that the judgment of that court was just and did not deprive the plaintiff in error of its property without due process of law.

In closing their argument counsel for the Water Company address themselves to this Court as follows (P. 76):

> "For six years the plaintiff in error has fought for its life and its possessions before the Commission and the courts against which it deems to be misguided official action. It has survived till now only by reason of a supersedeas of the Commission's order."

As much may be said on behalf of the thirty-five thousand or more consumers of the water of this company. For over six years they too have fought for their lives, for water is a necessity of life. They too have fought for their possessions, of which they have been deprived by being compelled to pay these excessive rates or have the service discontinued.

Every three months for over six years, these thirty-five thousand or more consumers, many of whom are workers in the mills of Pittsburgh, have uncomplainingly paid these rates, determined by the Commission and the Supreme Court to be unjust and unreasonable, because they were advised that their property was being taken from them by due process of law and that if the case were finally determined in their favor they would have a right to petition the Commission for reparation.

> See *Ben Avon Boro. vs. Ohio Valley Water Co., No. 2*, 260 Pa., 310.

Finally counsel for plaintiff in error plead (P. 77):

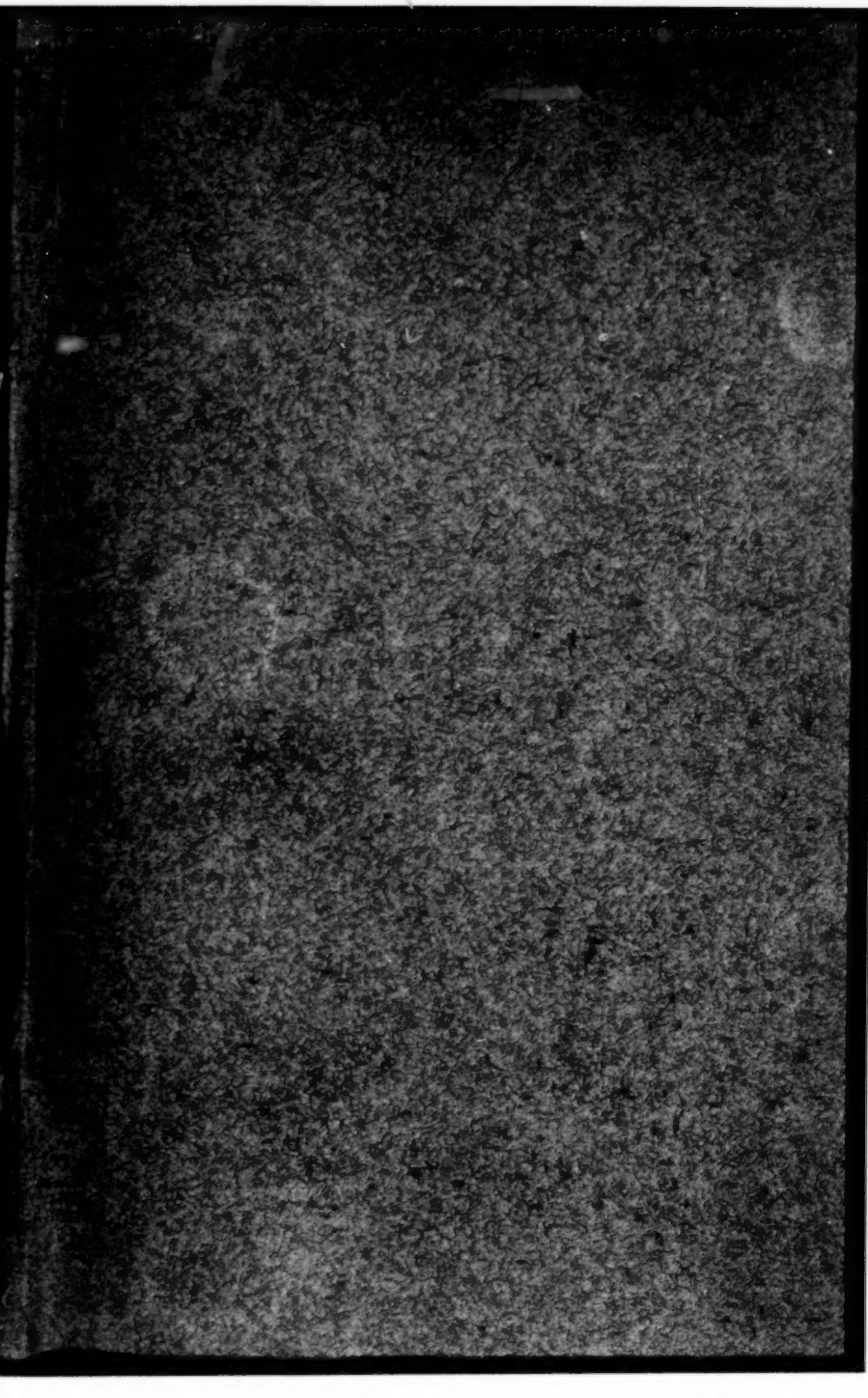
> "Its case is now before your Honors, and its sole hope against impending calamity lies in the remedial constitutional action of this Court."

If the possibility of having to repay a portion of these excessive rates to such of its consumers whose claims are not barred by the two year limitation of the Public Service Company Law (Art. V, Sect. 5, P. 1405, Act 1913; *Purdon's Digest*, Vol. 6, P. 7223, Sect. 98), is an "impending calamity," then it is not surprising that plaintiff in error should seek to overthrow the judgment of the Supreme Court of Pennsylvania and attempt to read into the law by construction provisions which it considers should be there.

The language of Mr. Justice Dean of that Court, in *D. of A. R. vs. Schenley No. 2*, 204 Pa., 584 (P. 588), seems equally applicable here:

> "It may be that our Republican form of government is not the best that could be devised; but the people think it is, and appellants will have to rest content with it."

Respectfully submitted,

DAVID L. STARR,
ALBERT G. LIDDELL,
LEONARD K. GUILER,

Attorneys for Ben Avon Borough, McKees Rocks Borough, Bellevue Borough, Avalon Borough, Township of Stowe, West View Borough, and William B. Dawson, Defendants in Error.